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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

PETER N. LAZAROS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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October 5, 1973

THE INLAND PRESS, DETROIT, MICHIGAN

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October 5, 1973

The Petitioner, PETER N. LAZAROS, prays that a Writ of Certiorari issue to review the Opinion and Judgment of the Sixth Circuit Court of Appeals rendered in these proceedings on the 11th day of June, 1973.

OPINIONS BELOW

The Opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, p. 1a. The Opinion of the Court of Appeals for the Sixth Circuit denying the Motion for Rehearing entered by the Court of Appeals on September 10, 1973, unreported as appears at Appendix B, infra, ppgs. 2a-23a.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit from the United States District Court of the Eastern District of Michigan was decided and filed on June 11, 1973 (see Appendix A, infra p. 1a).

The Jurisdiction of this Court is based upon the fact that the Court of Appeals and the Federal District Court has so far departed from the accepted course of Judgment or, so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision.

QUESTIONS PRESENTED

1. Where grand jury testimony is compelled following a grant of immunity may the witness be convicted of perjury in the course of that testimony if it is subsequently shown that:

a. The Grand Jury was not then pursuing an investigation to determine whether any crime had been committed? Or,

b. No intention had ever existed to use the witness' testimony for any purpose other than as a basis for the witness' indictment for perjury or as a means of publicizing his account of certain events? Or,

c. The immunity was granted in consequence of a consciously false representation by the prosecutor to the court concerning the nature of the Jury's current activities, and the Statute would not have permitted a grant of immunity and the compelling of testimony if the truth had been told?

2. Where the court does not believe the testimony of a witness, may that Court order the witness imprisoned

until the witness agrees to give testimony which he has already sworn would be false if given?

And, where a court takes such acts, may the witness be charged with perjury in consequence of giving testimony which complies with the Court's order?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF COURT INVOLVED

Constitution of the United States, Amendment V:

> ". . . no person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

Constitution of the United States, Amendment XIV, Section 1:

> ". . . nor shall any person . . . be deprived of any life, liberty, or property, without due process of law . . ."

18 U. S. C. 1621:

> ". . . testimony was coerced within the meaning as this Court interpreted."

STATEMENT OF FACTS

Appellant was charged with twelve counts of perjury. On a jury trial, he was convicted of all counts, and received consecutive prison sentences. He appeals that judgment, seeking reversal.

Appellant Lazaros became an informant for the State of Michigan following an assault by a criminal associate, Joseph Barbara, upon Lazaros' wife. He and the members of his family were assigned a 24 hour guard service for a period of 14 months. (Tr. 499). His guard was removed on December 21, 1969, four months after he was indicted here (Tr. 484). Protection was deemed necessary by the Michigan authorities because of his assisting them in

informing upon dangerous criminals (Tr. 503). Any doubt in Lazaros' mind as to his precarious position would have been put to rest by his experience with an attorney, one Woods, nominee for the office of United States Attorney in Michigan. Lazaros, learning of a death threat should he continue to see the attorney, visited him with a recorder, supplied by the State of Michigan. After the tape was relayed to the Justice Department, Woods' nomination was withdrawn (Tr. 511).

That the Michigan authorities regarded him as a marked man was evidenced by a statement acknowledged by government witness Thomas G. Plunkett, prosecuting attorney for Oakland County, Michigan. Prior to the trial of this case, Mr. Plunkett in a television broadcast delivered himself of the following:

> "What Mr. Lazaros is afraid of is that if he goes to jail for what he said before, some punks like him will get him if he goes to jail. But we'll try to do our best to put him there so that they can get their chance."

In November, 1968, Lt. Schwartzendruber of the Michigan State Police (Lazaros' principal contact with the State Police authorities) learned from Lazaros of possible impropriety by federal Internal Revenue Service Agents Olszewski, Harris and McDonald (Tr. 476 and 477). He introduced Lazaros to Internal Revenue Service Inspectional Division Agent DeBoer on November 21, 1968. Lazaros was advised by DeBoer, in Schwartzendruber's presence, that if he gave DeBoer false information he was subject to five years imprisonment and a heavy fine (Tr. 353, 354, and 517).

Initially, Schwartzendruber recalled, Lazaros was re-

luctant to talk to DeBoer, and discussed activities of IRS agents only in vague terms (Tr. 479).

In succeeding months DeBoer found that Lazaros was a full-time occupation. Commencing in December of 1968, he had at least 55 encounters with him, spoke to him on the telephone, and was in Lazaros' home about 35 times (Tr. 420). He left the city with him on at least two occasions, once for a period of four days (Tr. 396 and 397). But DeBoer's persistence bore fruit, or seemed to. Lazaros initially limited himself to derogatory information concerning Agents Harris, McDonald and Olszewski (none of whom are either mentioned in the indictment or appeared at the trial to contradict Lazaros). (Tr. 477). Between December 10, 1968 and February 12, 1969, Lazaros condemned James Lee, John Gardner, and Ellis Lockwood (Tr. 360, 361 and 362). On February 12, 1969, DeBoer showed Lazaros pictures of Internal Revenue Service Agents. Lazaros told DeBoer that a photo of Agent Getto portrayed a man known to him as "Pops" (Tr. 386) and as "Sam Abraham." The record does not disclose whether any IRS agent is actually named "Sam Abraham." Lazaros said Agents Lockwood, Lee, Gardner and Getto had attended Lazaros' Christmas party in 1967 (Tr. 389). Other vaguely identified agents had previously been mentioned e.g., "Ben" (Tr. 363) and yet another unknown agent to whom one Marty Thomas gave $2,000 (Tr. 380 and 381). Sensing the value of his new source, DeBoer traveled to Washington. There the staff working under DeBoer's leadership was augmented by the addition of six agents (Tr. 397).

Within two weeks of exhibiting the photographs to Lazaros, Lazaros discussed a visit in 1963 to a prize fight

in Cleveland, during which agent Getto was given $400 or $500 surreptitiously, by the devise of making it appear that he won it in a hotel room crap game (Tr. 387).

During the course of DeBoer's investigation, he did not bring about a situation in which Lazaros could view the accused agents personally. They were accused by name only, any identification being made by means of photographs. It was uncontradicted that the pictures he was shown were clippings of people that were together or pictures from books, newspapers or magazines (Tr. 716 and 717). Likewise uncontradicted was Lazaros' complaint to DeBoer that the government should have better pictures for the purpose of identification than the ones that were shown him, and that Lazaros told DeBoer that before he made any statements concerning any names, he would like to identify them in person (Tr. 717). DeBoer testified that Lazaros had asked to see the people named personally, so that he could make a positive identification. But Lazaros was never taken to a line-up (Tr. 473).

In addition to the underworld threats to Lazaros' safety, underscored perhaps by Schwartzendruber's acknowledgement that Lazaros would be protected only as long as he remained an informant (Tr. 503), Lazaros was a defendant in a case then pending in Oakland County. Plunkett, the county prosecutor, offered to provide his own jail for Lazaros' murder, the contempt proceedings having failed. That case was of sufficient moment for Lazaros to have asked for Agent DeBoer's intervention on 25 different occasions (Tr. 412) while he simultaneously importuned Lt. Schawrtzendruber for similar assistance 30 or 40 times (Tr. 499). In addition, Lazaros was the target of a federal tax case (Tr. 596).

Supplementing these threats to his life and liberty, Lazaros was subjected to Schwartzendruber's reminders of the crime of perjury on 30 occasions (Tr. 481). DeBoer concurring, advised him that if he furnished false testimony before the grand jury he would be indicted for perjury and DeBoer would be the one to come out and "throw his fanny in jail." (Tr. 408).

Intermittently, the subject of using Lazaros as a witness before the grand jury arose, apparently first on March 4, 1969 at which time Lazaros said he did not need immunity (Tr. 764 and 765), a position repeated again by Lazaros on June 12 (Tr. 765).

As the investigation progressed, DeBoer appeared to be corroborating some of the information provided by Lazaros. With Lazaros' assistance, DeBoer was able to talk to one BooBoo Davis in the Monroe County Jail, and remarked that Davis had identified John Gardner (Tr. 520 and 568). Sgt. Aird, one of Lazaros' round-the-clock guards, heard DeBoer say that he had corroborated some of the things Lazaros was telling him (Tr. 613). Indeed, DeBoer, upon being asked on cross-examination if he had claimed he had never found corroboration, replied "I didn't say that." Asked, as to the Internal Revenue Service Agents referred to in the indictment, if it were not the case that he had not corroborated Lazaros' allegations, DeBoer replied, "That's determined by who is making the evaluation." (Tr. 417). DeBoer's comment illustrates the then developing schism between the investigators and the prosecutors.

It deepened. DeBoer became perturbed by the order in which grand jury witnesses were called. It was the first case in which DeBoer saw all the accused persons called as witnesses before the accuser was called (Tr. 417). He

said that he disagreed with the prosecutors on a number of matters (Tr. 457). He conceded that a state of hostility grew between himself and Mr. O'Leary (Tr. 457). This was not alleviated, by his treatment at the hands of O'Leary before the grand jury. DeBoer described that treatment as "abusive," and it had inspired DeBoer to remark, as he left the grand jury room, that he himself needed a lawyer (Tr. 423). Things had arrived at a state by June 26, 1969 (when Lazaros told the government that he did not want to testify) that DeBoer and the prosecutors were not on speaking terms because, as between the prosecutors and DeBoer, "contact was completely severed." (Tr. 460). Mr. O'Leary, called by the defense, testified to a "divergence of opinion" between investigators and prosecutors (Tr. 698).

By June 26, 1969 (prosecutor O'Leary testified at trial, (Tr. 698 and 699) he had already concluded that no bribery had taken place; that the agents were blameless. It was in this context that O'Leary decided to seek immunity for Lazaros.

He testified at the trial that without any expectation that he would seek an indictment against the agents, he, in late July or early August, 1969, sought permission from his superiors to apply for immunity for Lazaros (Tr. 698 and 699).

He also testified that in seeking immunity for Lazaros his only purpose was to get evidence against Lazaros (Tr. 698 and 699).

He testified that when he decided to ask for, and did obtain authority to get immunity for Lazaros, the only person he expected to be indicted as a result of the immunity was Lazaros himself (Tr. 707).

On August 21, 1969, Lazaros appeared before the grand jury. In his first appearance he asserted his privilege against self-incrimination.

Thereupon, prosecutor O'Leary applied to the District Judge to grant Lazaros immunity. The judge made a finding that the questions Lazaros was asked fell within the scope of 18 U.S.C. Sect. 201 (bribery) and that the matters being investigated involved possible violations thereof.

The judge based his immunity order on the statements in the prosecutor's application for immunity (one of which was that it was made in good faith) and upon the statements of government counsel (Tr. 310, 311, 312, and 314).

But when applying for immunity prosecutor O'Leary did not reveal to the Court that he had long since concluded that no bribery had taken place, so that no investigation of bribery remained to be done; nor the fact that the immunity was not sought in order to produce evidence against anyone other than Lazaros; nor that his intention in seeking immunity was to acquire grounds for indicting Lazaros.

Mr. O'Leary revealed these facts, reflecting the actual state of affairs only when he was called much later as a witness at the trial (Tr. 699 and 700).

As a witness in the trial, O'Leary was cross examined by the government as to why he applied for immunity for Lazaros. He answered that he wanted to test Lazaros' allegations under oath one way or the other. He testified that if Lazaros had retracted his accusations in his testimony before the Grand Jury, he would have attempted to make Lazaros' testimony public (Tr. 710).

The Judge, never having been advised that the actual reasons for the application for immunity were completely

different from the reasons presented to him by O'Leary, granted the immunity (Tr. 310, 311, 312 and 313).

At the prosecutor's request, he also directed Lazaros to ". . . just make direct answers to the questions that are asked and (don't) embellish anything of your own." (Tr. 314).

Reappearing before the grand jury under immunity, Lazaros sought to qualify certain of his answers, and sought to indicate uncertainty or doubt as to some of his answers, stating that he could not be sure, that he "thought" that certain things were the case, that to the best of his knowledge things happened that way but that he could not swear to it, and the like (Tr. 123 through and including 133).

Lazaros tried to explain that in his statements to DeBoer, he was not under oath and that it was his understanding that he was merely giving information for intelligence purposes. He agreed to do so and gave him all the information he could. He wanted to explain to the grand jury that the information DeBoer was after was different from what was apparently sought when flat "yes" or "no" answers were required (T. 129 and 130).

The proceedings were then returned to the courtroom, where prosecutor O'Leary urged that Lazaros be held in contempt, knowing that his testimony was evasive and designed to obstruct the grand jury, and that it was false (Tr. 318).

After telling the judge that Lazaros' testimony was false, Mr. O'Leary did not then further advise the Judge that at that very time, he fully understood that Lazaros was "simply trying to avoid committing perjury." He conceded that to have been Lazaros' purpose when he testified at the trial (Tr. 701).

On presentation of the prosecutor's motion, the court adjudged Lazaros contemptuous and ordered him jailed forthwith until he purged himself of his contempt or until the termination of the service of the grand jury eleven months thence, in July, 1970 (Tr. 327, 328, 329 and 330). Purging required "direct answers" (Tr. 336).

Prior to Lazaros' grand jury appearance, an informant, one Blackjack Griffiths, had been confined in the Wayne County Jail, until his widely publicized death, caused by consuming a cupcake served to him there, which had been treated with cyanide. Schwartzendruber had discussed it with Lazaros (Tr. 501).

Given a reprieve for the lunch hour, Lazaros talked the matter of his impending afternoon testimony over with his lawyer, Robert Anderson. Mr. Anderson testified that Lazaros was afraid to go to jail, saying that he would not live 24 hours in the Wayne County Jail (Tr. 624). Anderson was not a specialist in criminal law, nor had he ever had any experience with federal grand jury proceedings (Tr. 627). Faced with the alternative of giving the Grand Jury what Lazaros thought was required of him to purge his contempt, or going to the Wayne County Jail, Lazaros was advised by his inexperienced lawyer, according to that lawyer, "Pete, you're damned if you do and damned if you don't." (Tr. 624).

Anderson's testimony that Lazaros was afraid to go to the Wayne County Jail because his life would be in danger there (Tr. 631) had a basis in fact, according to the other government witnesses, among them Lt. Schwartzendruber, who regarded his murder in jail a real possibility (Tr. 504), and confinement there a danger to his life (Tr. 505); prosecutor O'Leary, who, although he admitted knowing of the

peril, took no steps to avert it after Lazaros was sentenced to jail (Tr. 704).

Following his lunchtime discussion with counsel, Lazaros returned before the grand jury under circumstances which Lt. Schwartzendruber testified could be expected to have terrified him (Tr. 504). There, he responded directly, though possibly untruthfully to the final questioning by the prosecutor. In the course of that questioning, whenever Lazaros indicated hesitation or doubt, he was brought promptly to heel, and responded with the "yes" or "no" answers required by the prosecutor (Tr. 136 through and including 182).

The grand jury proceedings then adjourned. Lazaros returned on August 25 and the court ordered the contempt citation set aside (Tr. 336). Lazaros' indictment for perjury was filed on the succeeding day.

REASONS FOR GRANTING WRIT OF CERTIORARI

I.

THE PROSECUTION OF APPELLANT SHOULD BE BARRED AS A MATTER OF PUBLIC POLICY

We have no hesitancy in characterizing this prosecution as quite the most disturbing which we have encountered. Its implications, in terms of the relationship between government and its citizens, could hardly be more ominous. Its potential for mischief in respect to the basic integrity of our system of criminal justice, shouts for corrective action.

In this case, the government has cynically lied to a federal court in order to obtain authority to commence a proceeding. The falsehoods related to the Court's very jurisdiction in those proceedings.

The proceeding was based on a petition by the prosecutor, seeking to compel testimony under a grant of immunity. In order to establish that the district court had jurisdiction to grant that relief, the prosecutor solemnly assured the court that the witness had important information concerning a bribery investigation then in progress.

But, as the prosecutor well knew at the time, no investigation of bribery was then in progress. There had, to some degree, been an investigation of that sort; but it had ended, and everyone associated in the investigation was completely satisfied that no bribery had occurred.

The prosecutor had no intention of immunizing the witness against anything. His only objective, was to incriminate and imprison that witness. He was manipulating the court and its process toward that end.

Nor did the prosecutor desire any information from the witness. He already had all the information he needed or wanted.

Unknown to the Court, the sole objective of those proceedings was to extract perjury from the witness, in order that the witness could be prosecuted for such perjury.

Appellant has been sentenced to the penitentiary in consequence of prosecutive and police activities whose very contemplation bespeaks a triumph of opportunism over integrity. He committed perjury; but the prosecution demanded that perjury, and would settle for nothing less.

Rarely has it been conclusively proved by prosecution testimony, as was done in this case, that the only purpose of a Grand Jury session was to cause the crime of perjury to be committed in the Grand Jury chamber. If that is the legitimate function of a Grand Jury—and most assuredly it is not—that function could hardly be discharged by such

acts as falsely representing to the court the nature of the investigation then in progress.

The record of this prosecution presents a unique picture: That of a convicted perjuror who is richly entitled to view his prosecutors from a posture of pronounced moral superiority.

The whole thing is literally disgraceful, and we urge that nothing more than that sense of disgrace should be required to warrant summary reversal. In deference to a system of justice to which we have devoted our lifetimes, we now proceed to restate the issues in classic legal terms. We do so, in the heartfelt hope that we are uttering something more meaningful than a threnody to that system.

Subsequent to the indictment in this case, the power to compel testimony under an immunity grant has been expanded enormously. 18 U.S.C. 6002 now provides that immunity can be given in any case, and need only be of a limited nature. This statute was held constitutional in *Kastigar* v. *United States (1972) 32 L. Ed. 2d 212.* These developments augur a substantially significant increase in the frequency of applications for immunity.

The power to compel testimony in exchange for "use" immunity, is the ultimate investigative weapon. Its abuse can readily produce the ultimate threat to individual rights.

The power was granted because:

> "Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court or before grand juries or agencies. Such testimony constitutes one of the Government's primary sources of information." *(Kastigar, 32 L. Ed. 2d at 216)*

But information is a very different concent from a deliberate attempt to obtain perjury.

If it is to be deemed a proper governmental function, to initiate Grand Jury proceedings for the sole purpose of extracting from suspects testimony which has already been proven to be false, thereby justifying a perjury indictment, then we will have a vastly different form of government from any that we have previously experienced.

If anyone doubts the seriousness of the threat, let him consider the arrogance and high-handedness applied in the grand jury inquisition of this appellant by his prosecutor. It was a literal bludgeoning.

Every citizen is now vulnerable to such bullying. And if, in the locked grand jury chamber, with no means of objection to the tone or form of questions and no protection against badgering tactics, he can be made to utter a falsehood, then his government may claim the right to prosecute him for perjury.

If all else fails, future prosecutors might try the innovation employed in this case: Bring the witness back before the court and obtain an order sending him to jail until he changes his testimony so that it will be clearly provable perjury.

The departures from accepted procedure employed in this case are so startling as to assure that precedents cannot be numerous.

There are few cases directly in point. Happily, they are unanimous in reaching the result obviously compelled by a sense of basic decency. The principal is:

> A witness cannot be punished for perjury committed in a proceeding whose entire purpose was to obtain his testimony as a basis for charging that

witness with committing perjury in the course of that testimony.

Many considerations dictate that result.

For one thing, perjury is punished because it deflects the search for reliable information. The purpose of such punishment is to redress that wrong. *United States* v. *Manfredonia (2 Cir. 1969), 414 F. 2d 760, 764.* But that consideration is completely irrelevant when the objective of an inquisition is to commit the witness to a story which the tribunal already knows to be untrue. In such a situation, the interrogation is simply not a search for information.

Another consideration is, that the only legitimate purpose of receiving evidence is to determine facts. If the witness is called for any other purpose, his testimony is simply not "material" to any lawful function of any evidentiary hearing.

Yet another consideration, is the utter illogic of the prosecutive position in such a situation. Having desired and sought perjury and having received what he hoped for, the prosecutor exclaims in horrified tones, "you lied to me!" He then runs before the court to demand satisfaction. Small wonder that the courts have turned deaf ears to such pleas.

Hopefully, the paucity of cases on point reflects a general unwillingness of public officials to stoop to so abysmal a posture. But the expressions of those courts which have been faced with such situations are so definite, and the conduct of this prosecution in the face of those expressions has been so obtuse, as to warrant a brief discussion of the controlling authorities.

United States v. *Icardi (D.C.D.C. 1956) 140 F Supp. 383,* was a prosecution for perjury committed before a Congressional committee. The Committee was considering the en-

actment of laws to curb crime overseas by members of the armed forces—a valid legislative purpose, as the Court held. The Committee focused on a specific crime as illustrative of the need for such legislation. Icardi had been implicated in that crime. The Committee had transcripts of statements given by Icardi to other authorities concerning the matter; but it called him "to give him an opportunity to tell his side of the story", having first "considered the possibility of a perjury indictment as the result of Icardi's testimony." The Court held that this was not proper legislative purpose. Therefore, at the time Icardi testified the Committee "was not functioning as a proper tribunal and his testimony," therefore. "did not relate to a material matter". Since the Committee had already completed its decision on all legislative issues before hearing Icardi, the testimony could not have been material in any event; for "the test of materiality is whether the false testimony was capable of influencing the tribunal on the issue before it." Therefore, the falsity of Icardi's testimony before the Committee could not amount to perjury. (140 F Supp. at 388-389).

Two years later, the Eighth Circuit held that the same principle applied to a federal grand jury proceeding. *Brown v. United States (8 Cir. 1957), 245 F 2d 549,* was a review of a conviction for grand jury perjury. The case is startlingly similar to the case at bar. It arose out of an investigation into alleged corruption of IRS personnel. One agent was called before a grand jury, and interrogated as to whether he had attempted to block the investigation. His denials formed the basis of his indictment for perjury. Reviewing his conviction, the Eighth Circuit Panel concluded that the prosecutor had called Brown before the grand jury "for the purpose of extracting testimony from him, with a view

to prosecuting him for perjury and without any purpose of obtaining from him any evidence upon which, in whole or in part, it could find a true bill . . ." The Court held that "such a purpose does not come within the competency of the grand jury; that testimony so obtained was not material within the intentment of Section 1621, United States Code, and could not be made the basis of prosecution thereunder." (245 F 2d at 554).

The Brown court noted with some impatience that the prosecutor's powers, although broad, "certainly did not extend to the conduct shown by this record . . . We have not encountered any instances in this Court where any (prosecutor) has made such a use of a grand jury as that resorted to here." (245 F 2d at 555).

The third case, *United States* v. *Cross (D.C.D.C. 1959), 170 F Supp 303,* involved an indictment for perjury in testimony given before a Senate Committee. The Senate Committee was exploring the extent of criminality in certain aspects of labor-management relations. There was no question that the general subject matter of the inquiry related to a proper legislative purpose; that it was also clear that the questions propounded to Cross were material to the Committee's objective (170 F. Supp. at 305-306). The fatal defect of the Cross prosecution, however, consisted in facts identical to those presented by the appeal now before your Honors. Cross testified before the Committee, denying certain allegations of violent acts. Another witness was called, corroborating the accusation against him. Cross was then recalled, questioned again about the same events in somewhat different terms, and indicted for perjury in consequence of his second testimony.

The Cross court rejected the prosecution's arguments urging the technical possibility of relevance and materiality. Even if testimony is relevent, the Court held, a witness can only be called for a bona fide informational purpose. (170 F Supp at 306). Considering the manner in which the witness was questioned, the Court concluded that he had been recalled for the improper purpose "to render him more liable to (perjury) prosecution." He had already been heard once. The manner in which he was questioned, showed that the questioners "had little confidence in his veracity." Thus, the second appearance was not arranged in order to obtain information. The materiality of the perjured testimony at the second appearance "must be tested by the purpose of the Committee in propounding the specific questions upon which the indictment is based, at the time they were asked." Although the original questioning related to a legislative purpose, the second interrogation was designed to provide "a firmer basis for a perjury indictment that was afforded by the prior denial." Thus, the second questions were not "material" to any lawful interrogative purpose, and did not constitute perjury. (170 F. Supp 303).

Perhaps because of awe at the extent of the revulsion expressed in the Brown decision, no subsequent instance of the use of the grand jury for the purpose of causing perjury has appeared until the present case emerged.

In the present case, the facts could hardly be more clear. We are not dependent upon inference, strong as the inferences are. For the prosecutor himself testified at the trial that his purpose in applying for immunity was to extract perjured testimony from Lazaros, in order that Lazaros might be indicted for that perjury. He had no slightest expectation or intention that Lazaros' testimony, given under

pretended immunity, could result in the indictment of anyone on earth except Lazaros himself. Thus motivated, he had fraudulently petitioned the Court to grant Lazaros "immunity", falsely asserting in that behalf that he was trying to obtain indictments for bribery, although, as he later testified, he had no intenion of using Lazaros' testimony against anyone other than Lazaros himself. It was his secret intention that the "immunity" that he piously sought "in good faith", should cause the imprisonment of the person thus "immunized". If, in order to accomplish that, it was necessary for him cynically to lie to the court concerning his objectives, then so be it: He did not hesitate.

This was power gone berserk. This was corruption much more sinister then the fiscal dishonesty ostensibly being investigated. The indignation evoked by the facts of Brown, arose in a pale cause indeed, compared to the visious assult upon the integrity of the judicial system and the arrogant abuse of authority shown by the record of this case.

The implications here are so disquieting, that we are not content to rest on the solid authority of Brown, Icardi and Cross. Confident that this Court's supervisory authority could never be evoked in a more compelling cause, we advert to the underlying elements of the result reached in those cases.

II.

THE PERJURY WAS NOT MATERIAL TO ANY LEGITIMATE FUNCTION OF THE GRAND JURY

There has never been any doubt concerning the sole function of the Grand Jury: The inquiry into the identification of persons responsible for criminal offenses.

The institution was originated by the Assize of Clarendon of 1166, augmented by the Assize of Northampton of 1176. Inquest juries from each vicinage were appointed, to meet periodically to report the names of notorious local criminals to the King's Sheriff or itinerant justice. Those accused were forced to submit to ordeal (Hollister, *The Making of England,* Heath and Company, 1966, p. 127).

As it ultimately evolved, the Grand Jury served two fundamental purposes: The protection of the innocent against unwarranted accusations, and the obtaining of information with which to punish the guilty. *Hale* v. *Henkel* (1960 201 U.S. 43, 61-62).

Its function is to determine whether the evidence justifies the commencement of a criminal trial; that, and nothing more, *U.S.* v. *Armour & Co., (D.C. Cal. 1963),* 214 F. Supp. 123.124. The use of the Grand Jury for any other purpose has always been strongly disapproved, *Brown* v. *U.S.,* (8 Cir. 1957), 245 F. 2d 549, 555; *U.S.* v. *Dardi, (2 Cir. 1964)* 330 F. 2d 316, 336. In *Gaither* v. *U.S., (D.C. Cir. 1969),* 413 F. 2d 1061, it was held improper for a Grand Jury to return a mere "presentment." It cannot make accusations short of indictment or furnish mere advice to the Legislative or Executive branches of the government. *Application of United Electrical, Radio and Machine Workers of America* (S.D. N.Y. 1953) 111 F. Supp. 858, 863-865, 866-868. It was not until the Organized Crime Control Act of 1970, enacted subsequent to the indictment in this case, that Grand Juries became empowered to issue general reports; and even then, the power was reserved to "special" grand juries, under highly restrictive circumstances and safeguards. 18 U.S.C. 3333.

In the case at bar, the Grand Jury ostensibly convened to

determine whether certain accused IRS agents and others should be required to stand trial on charges relating to bribery. But any such function had long since been performed prior to the testimony of Lazaros. Long before that time, the Grand Jury and its prosecutor had concluded that the agents should not be required to stand trial on charges of bribery. Since they had decided that the IRS Agents had not been bribed, it was obvious that Lazaros, the informer, could not properly be put to trial on charges of bribing those agents.

That was the end of the Grand Jury's legitimate function.

The manner in which the Grand Jury discharged that function may fairly be characterized as unique. It was under the charge of a prosecutor who started with grave reservations concerning the validity of the accusations. It heard from the several accused and their witnesses, before calling the accuser—a most unusual sequence.

When it finally succeeded in compelling testimony from Lazaros, it asked him only whether the accused agents had taken money on two specific occasions, and asked nothing whatever concerning the issues which would obviously be paramount in any investigation of bribery. Lazaros was not asked why the money had been paid, or what the agents had done or agreed to do in order to obtain the bribes or what was the relationship between the agents and those who had bribed them. He was not even asked whether the money paid was a bribe—only whether it had been given. He was asked nothing whatever about agents Olszewski, Harris or McDonald, the only agents he had accused spontaneously. No reasonable person could call the prosecutor's questioning of Lazaros an investigation of the issue of bribery.

Once the Grand Jury had reached its determination whether anyone should be indicted for any federal offense theretofore committed, its function was at an end.

True, it might have undertaken an investigation whether Lazaros should be prosecuted for giving false information to IRS agent DeBoer, under 18 U.S.C. 1001.

But in an investigation such as that, the statute operative at the time should not have authorized the compelling of Lazaros' testimony under an immunity grant. 18 U.S.C. 2514, 2516 (c).

And the Grand Jury's objective was to obtain Lazaros' testimony.

Its purpose was not to use that testimony as the basis for accusing anyone of anything. Instead, it had only two purposes, both quite illegal:

(1). To cause Lazaros to withdraw his accusations. In that event the prosecutor planned to release Lazaros' recantation to the public—a violation of the doctrine forbidding abstract reports by the Grand Jury, and a violation of every concept of Grand Jury secrecy.

It must, we suppose, be presumed that at some stage of its inquiry, the grand jurors (and perhaps even the prosecutors) were in fact seeking to determine whether bribery charges should be preferred. But perjury is not material to an investigation in which the Grand Jury was formerly active, if that investigation has terminated at the time the false statement is made. *United States* v. *Icardi* (D.C.D.C. 1956), 140 F. Supp. 383, 389. False statements simply do not constitute perjury unless they are material to the inquiry under way at the time the perjury is given; materiality is judged only as of the time of the testimony, and not

at any other time. *United States v. Cross*, (D.C.D.C. 1959) 170 F. Supp. 303, 309.

The testimony was, of course, "material" (in a loose sense) to a determination whether the grand jurors would release that testimony to the public, or use it as the basis of a perjury indictment against Lazaros. But it was not a lawful function of the Grand Jury to obtain exonerative testimony for public distribution, nor to attempt to extract perjury from the witnesses before it. Thus, the testimony was not material to any lawful function of the Grand Jury.

Nor could such a claim of materiality sustain the conviction in any event. For both the petition to compel appellant's testimony and the indictment alleged that the Grand Jury inquiry at the time was whether the agents had taken bribes. The kindest thing that can be said concerning those documents is that they were admittedly untrue. The prosecution is clearly limited to that alleged area of materiality; and in that respect, its proof has failed completely.

III.

THE DISTRICT COURT'S JURISDICTION WAS FRAUDULENTLY INVOKED BY THE PROSECUTOR

The challenged testimony was, as previously indicated, given in a proceeding which had as its sole purpose the obtaining of that testimony—to state the issue in the politest of terms.

Alternatively, (2) To cause Lazaros to repeat his accusations—not as a means of informing the Grand Jury, but only as a condition precedent to Lazaros' indictment for perjury. That indictment would accomplish the same objective as would alternative No. 1: The public exoneration of the accused agents.

Thus, neither the Grand Jury nor the prosecutor were particularly concerned with getting information from Lazaros. Their only concern was in getting him to speak unequivocally, in order that the Grand Jury's unauthorized objective could be realized.

The Grand Jury was not "inquiring". It follows, necessarily, that no answer which Lazaros could have given would have been "material matter", in the language of the statute (18 U.S.C. 1621) or "material to this Grand Jury investigation". as alleged in the indictment.

Under the language of the statute, as necessarily reflected in the charge made by the indictment, a false statement under oath does not constitute perjury unless it is "material". The materiality of the falsehood is essential to conviction under the statute. *Barnes* v. *United States* (5 Cir. 1967) 378 F. 2d 646, 649. Materiality must be judged in the light of the fact that the only function of the Grand Jury is to determine whether formal charges should be made. Falsehood cannot be actionable as perjury unless it is material to the investigation being made by the Grand Jury at the time of the utterance. Therefore, materiality is limited by "the grand jury's objective at the time." *United States* v. *MacFarland* (2 Cir. 1966) 371 F. 2d 701, 703.

Testimony is not material unless it is "capable of influencing the tribunal on the issues before it." *Fraser* v. *United States,* (6 Cir. 1944), 145 F. 2d 145, 149.

But the Grand Jury was making no investigation at the time Lazaros testified. Its investigation had ended. There was no unresolved fact issue before it for consideration.

In order to obtain that testimony, a collateral proceeding was undertaken under the provisions of an immunity statute, 18 U.S.C. 2514.

At that time, this nation had never had a general immunity statute. Immunity was always limited to highly particularized situations and offenses. The first immunity statute (24 Stat. 379 Sec. 860) delt specifically with testimony in a congressional investigation of alleged corruption in the House of Representatives. Subsequently, such statutes were enacted to compel testimony in specialized proceedings regulating commerce, where the criminal penalties were negligible compared to the public interest in terminating commercial improprieties. Examples are the Federal Trade Commission Act. 15 U.S.C. 49; the Federal Communications Act, 47 U.S.C. 409 (d); the China Trade Act 15, U.S.C. 155 (c); the Perishable Agricultural Commodities Act, 7 U.S.C. 499; the Commodity Exchange Act, 7 U.S.C. 615; the Packers and Stockyard Act, 7 U.S.C. 222; the National Labor Relations Act, 29 U.S.C. 161 (3); the Securities Exchange Act, 15 U.S.C. 78u(d); the Social Security Act, 42 U.S.C. 405 (f); and the Fair Labor Standards Act. 29, U.S.C. 209.

Commencing in the mid-1950's, the application of immunity came to be extended to major crimes. But in all cases, recognition of the obvious potential for abuse caused the immunity to be limited to investigations of offences in clearly delineated categories, Examples are 18 U.S.C. 1406 (narcotics investigations); 18 U.S.C. 1954 (crimes against employee benefit plans) 18 U.S.C. 2424 (white slave traffic; and 18 U.S.C. 3486 (national Security investigations).

In 1968, the immunity authority of the Attorney General in criminal investigations was collated within the Omnibus Crime Control Act. The specific types of investigations in which immunity proceedings were authorized were expressed within a single statute. Immunity was authorized

in actions involving wrongful electronic interceptions, (18 U.S.C. 2514) and in other general categories of investigations (18 U.S.C. 2516) considered "intrinsically serious or . . . characteristic of organized crime," 1968 U.S. Code Cong & Admin. News, p. 2186. Investigations into crimes thus listed could be granted; otherwise, such proceedings were not authorized in federal courts. In Re Grant Jury Investigation, D.C. Pa. 1970, 317 F. Supp. 792, 796.

One of the offenses thus listed, related to bribery of public officials, 18 U.S.C. 2516 (c).

Neither false statements to government agents such as DeBoer, nor perjury per se, was included in that list.

In making application to the district court for immunity for Lazaros, the prosecutor was required to assert as a jurisdictional prerequisite to the institution of immunity proceedings against Lazaros, all of the following things:

1. That the Grand Jury was investigating the offense of bribery of public officials (or some other crime on the limited statutory list.)

2. That in his judgment, the testimony of Peter Lazaros was "necessary to the public interest" for the furtherance of that investigation. (18 U.S.C. 2514)

Had he not said those things, the court would have been without power to compel Lazaros to testify. The court simply lacked jurisdiction to grant an immunity petition which did not contain those allegations.

So the prosecutor made the allegations, specifically invoking Section 2514.

The allegations were false. The Grand Jury had concluded its investigation in the offense of bribery. It had already decided, as had the prosecutor, that nobody had

been bribed. The only intent of the petition was to force Lazaros to testify in the hope that he would commit perjury; and the only active area of Grand Jury investigation, was the search for a method by which Lazaros could be imprisoned for perjury.

But had the prosecutor disclosed these facts, the court would have lacked jurisdiction to compel Lazaros to testify.

The indictment against Lazaros was simply an attempt to capitalize upon a proceeding in which jurisdiction was obtained by fraud.

Classically, and obviously, no litigant may do that. A litigant may sometimes claim the benefit of a judgment obtained by fraudulent testimony or evidence; but no litigant may ever claim the benefit of a proceeding in which jurisdiction was obtained by fraud. *Turner* v. *Alton Banking & Tr. Co.*, (8 Cir. 1948), 166 F. 2d 305, 309. For jurisdiction obtained by fraud, is the equivalent of no jurisdiction whatever; and in the absence of jurisdiction, no court may act. *Green* v. *Obergfell* (D.C. Cir. 1941), 121 F. 2d 46, 54.

This is a vastly different thing from perjury committed in the course of a good faith proceeding, with respect to which it is ultimately determined that the federal court lacked jurisdiction. In such a case, it may be said that the preservation of integrity and dignity of federal judical proceedings demands vindication, where those proceedings are corrupted and tainted by perjury.

But here, the perjury was actually the ultimate relief sought by the prosecution. The least that can be said, is that the entire objective of the proceedings was to obtain the testimony of Lazaros.

Thus, we do not have a case of perjury committed in the course of a bona fide proceeding in which a challenge

to jurisdiction is subsequently resolved against a plaintiff.

Instead, we have a proceeding whose sole objective was to obtain testimony from a witness, in which the Court's entire jurisdiction was invoked through the plaintiff's deliberate fraud, followed by a claim for that plaintiff for relief predicated upon the nature of the testimony thus obtained.

In short: We have a plaintiff who demands satisfaction directly deriving from his jurisdictional fraud. Surely, such relief cannot be granted.

As a direct corollary of the foregoing proposition, there has been a total failure of proof on the indictment.

For the indictment alleged in each count that at the time the testimony was given the Grand Jury "was conducting an investigation to determine whether there had been committed in the Eastern District of Michigan and elsewhere, violations of the laws of the United States, to wit: Bribery of public officials in violation of Section 201, Title 18, United States Code." The indictment further alleges that "it was material to this Grand Jury's investigation to determine" whether the agents had been bribed.

The evidence conclusively demonstrated that the Grand Jury was making no such investigation, and that the testimony of Lazaros was in no sense material to the "determination" falsely alleged by the indictment.

Thus, essential allegations of the indictment are directly and conclusively disproved by prosecution evidence.

IV.

THE FALSE TESTIMONY WAS NOT GIVEN "WILLFULLY"

Another indispensable element of the offense of perjury, is that the offense must be committed "willfully" (18

U.S.C. 1621). Necessarily, the indictment made that allegation.

"Willful" is perhaps the most improbable single term which could be selected to describe Lazaros' conduct in this case.

When first called before the Grand Jury, he claimed the Fifth Amendment. He was invited to repeat to the grand jury the story ascribed to him by DeBoer, but refused to do so.

Ultimately, Lazaros was given immunity. He then went before the Grand Jury and stated, essentially, that the difference in circumstances between sworn testimony and DeBoer's protracted informal interrogation, coupled with the passage of time, made it impossible for him to swear that the things said to DeBoer were either true or false. He answered the Grand Jury's questions by swearing that unequivocal answers could not be given.

The prosecutor concluded that Lazaros was trying to avoid committing perjury.

So the prosecutor hailed Lazaros before the district judge, and asked that Lazaros be jailed for giving "evasive" testimony.

At a subsequent point of this Brief, we will argue that such action constituted a grave impropriety But for present purposes, we limit ourselves to the issue of willfulness.

In that context we observe simply that the trial Judge ordered Lazaros jailed until he should give unequivocal testimony.

Lazaros had just finished swearing that any unequivocal testimony would be perjury; but he was ordered to give unequivocal testimony, notwithstanding that statement.

In other words, he was ordered confined to jail until he agreed to say things which he had sworn would be perjury.

As though that were not bad enough, the terms of his confinement were, as previously indicated, such as to generate the very reasonable prospect that he might not emerge alive. He was under police guard to prevent his being murdered. Only a short time previously, another informant had been the victim of a highly sophisticated murder in the same place of confinement to which Lazaros was sentenced. A state prosectuor, viewing Lazaros' situation, later announced publicly and scornfully that Lazaros was simply trying to avoid going to jail because he knew he would be killed there by criminals who disapproved of informants. The mission of the law enforcement community, as he saw it, was to see that such persons got their chance to do exactly that!

The law enforcement community was at war with Lazaros, determined to get him at any cost, employing any means available. The legality of those means was beside the point.

Lazaros turned to his lawyers for advice. They were novices in criminal matters, and the information which he received can hardly be termed encouraging, but its technical accuracy cannot be faulted:

"Your are damned if you do, and damned if you don't."

Denied all chance for bail, and in proximate fear for his very life, Lazaros gave the testimony which formed the basis of the present indictment. He had warned, clearly, that any such testimony would be perjury. But the Grand Jury, the prosecutor, and the court itself commanded that such testimony be given.

So Lazaros gave it. And, sure enough, it was perjury.

But with at least equal certitude, it was not done willfully. And Willfullness is an indispensable element of the crime of perjury. *Smith* v. *United States* (5 Cir. 1968) 392 F 2d 169, 170 "Willfully" means "intentionally". *Harrell* v. *United States* (5 Cir. 1955) 220 F 2d 516, 521. And Lazaros had no intention to give the offending answers, except as the only alternative to jail.

True, Lazaros had a choice; but it was assuredly not a choice whether he would commit perjury. His only choice was as to the form that the perjury would take.

He might have testified at his last Grand Jury appearance that the agents were innocent. That, too, would have been perjury. Its perjured quality would be manifest from Lazaros' first testimony, given only hours earlier, that his memory and observational means would not support any unequivocal assertion, whether incriminatory or exonerative of the agents. Inconsistent testimony is now deemed perjury per se. 18 U.S.C. 1623.

But Lazaros was made to believe that what the government wanted, was an accusation. The prosecutor had so informed him in an earlier conversation and repeated the suggestion that day by representing to the court that the Grand Jury wanted to charge people with bribery, but had been thwarted in that effort by Lazaros' refusal to talk. Even to the last second, the prosecutor was waving before the Court Lazaros' statement to DeBoer, as illustrative of the testimony desired from Lazaros and the kind of contribution which he could make to the Grand Jury Inquiry, if only he were willing to do so.

In the contempt proceedings two hours earlier, Lazaros tasted the treatment given to witnesses who said one thing to DeBoer and a different thing to the Grand Jury. He had

every reason to believe that if his testimony should exonerate the agents, he would be locked away for a year, or such lesser time as prosecutor Plunkett's encouraged assassins might require to perform their work.

Lazaros did not "willfully" give one word of the testimony recounted in the indictment. To the contrary, his was the grudging and resigned act of a man who had exhausted all alternatives, faced with an implacable and malevolent foe of limitless resources.

We cannot in honesty say that he made the wrong choice. To the present, he is still alive.

V.

THE TESTIMONY DESCRIBED IN THE INDICTMENT WAS THE PRODUCT OF UNLAWFUL COERCION

We suppose that any witness who testifies unwillingly, may be said in some sense to have given a "coerced" statement. And we do not even remotely contend that coercion of that type will excuse perjury.

But it is a vastly different situation where the coercion takes the form of prescribing the very answers which the witness must give.

Here, the witness had testified that a failure of his memory and observational opportunities made it impossible for him to say whether specific people had attended specific events, and whether they had received money there.

If that testimony was false, it was perjury. A false disclaimer of knowledge is a violation of the perjury statute. *United States* v. *Nicoletti* (7 Cir. 1962), 310 F 2d 359.

By giving that testimony, Lazaros discharged his duty to testify. He had done everything which the court could lawfully require him to do. The Court did not believe that

testimony, because it chose (without any supporting evidence) to credit Lazaros' previous statements to DeBoer as accurate and truthful. The Court did not believe Lazaros' testimony of his inability to recall. But it had not right to demand anything more.

A court can, under some circumstances, compel a witness to testify. But if it does not believe his story, it cannot compel him to testify differently, nor can it ever compel him to testify in any particular way or to give any particular answer. Ex parte Hudgings (1919), 249 U.S. 378, 384. That proposition is too obvious for argument. The testimony must be that of the witness, not of the judge.

A Judge's only authority, is to compel a witness to speak. If the Court is dissatisfied with the witness' testimony, other remedies are available. But to demand that the witness change that testimony and say something which the judge believes to be true, is clearly not one of those remedies.

If the witness testifies falsely, he can be indicted for perjury. Perhaps, in certain circumstances, the judge may use his contempt power to punish a witness for giving testimony which the judge knows to be false and which obstructs the court itself in the performance of its duties.

But in such circumstances, if there be one, a proper contempt sentence could go no further than necessary to remove the obstruction; it could not be used to coerce the witness to give different testimony which would be acceptable to the judge and credited as truthful. *Ex parte Hudgings* (1919), 249 U.S. 378, 383-384.

Even if it had been proper to punish appellant for contempt, it is sufficient to note that no such thing was done. The appellant was indeed committed to jail for contempt;

but the contempt was civil and coercive, rather than punitive, in its character. He was not sentenced for any particular term. Instead, he was sentenced to remain in jail until he should give testimony whose content would be acceptable to the judge.

This was a purely civil contempt, designed not to punish the defendant's act, but to provide a remedy to the prosecutor—to force the appellant to give the prosecutor what he wanted. *Nye* v. *United States* (1940), 313 U.S. 33, 44; *McCrone* v. *United States* (1939) 307 U.S. 61, 64.

No judge lawfully possesses the power which was exercised here: To conclude that a witness' testimony is false, and to lock him up until he shall give testimony which the court does not consider false. The vice of such a practice is that the resulting testimony is very likely to be perjured. The witness become compelled to say whatever he believes the judge wants to hear.

The procedure adopted in this case, is precisely that forbidden by the classic admonition of the Hudgings court:

> "If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully, the power would result to impose a punishment for contempt, with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result, and the freedom of the citizen, when called as a witness in a court would be gravely imperiled." 249 U.S. at 384.

It is hard to believe that in 1969 a federal prosecutor has requested relief forbidden by Hudgings, and that a federal court has granted that relief. It would be almost easier to accept the violation by a court martial of the doctrine

of Ex Parte Milligan. Not even the most basic of appellant's rights was accorded proper respect in the proceedings below.

True, Lazaros could have appealed the contempt citation. But he was accompanied by counsel who lacked knowledge of criminal procedures. Nor would any sophistication have served him: In order to appeal, he would have had to go to jail and remain there, at least until a record could have been prepared and certified, and filed in the Court of Appeals; until a motion for bail, explaining all the circumstances, had been made; until the prosecutor had had an opportunity to respond to that motion; and until this Court could have considered the issue, the length of time involved would be unlikely to be less than a week. Lazaros had every reason to believe that he might not last that long in jail.

A homiletic illustration should suffice. Let us suppose that a government agent, with in the scope of his official duties, seeks a formal statement from a citizen. The witness disclaims knowledge of the matter under investigation. The agent believes that the disclaimer is false. He thereupon locks the witness up, and advises the witness that he will be held until he admits knowledge of the event and states what happened.

Assume further, that this is done on a weekend, so that habeas corpus is not readily available.

If the witness gains his freedom by giving to the agent a statement which is later shown to be false, would this or any Court countenance the prosecution of that witness under 18 U.S.C. 1001? The same considerations which would preclude that hypothetical prosecution, should forestall this one. No citizen should be criminally liable for statements given under unlawful compulsion.

The proposition has been aptly stated in *United States* v *Bell (C.C. Tenn. 1897), 81 F. 830, 840.* A reluctant witness who is lawfully compelled to testify, must speak the truth on penalty of perjury. But if the compulsion is unlawful, the Fifth Amendment provides a shield against a perjury prosecution.

VI.

THE IMMUNITY GRANT WAS NUGATORY IN REGARD TO THE TESTIMONY QUOTED IN THE INDICTMENT

The illegal nature of the compulsion visited on the appellant is also manifest from the fact that in regard to the testimony given in the indictment, he did not have immunity. The compelling of testimony over a claim of privilege against self-incrimination, is a clear constitutional violation where no meaningful immunity is conferred.

The immunity granted to Lazaros, like all such grants, did not extend to perjury committed in the course of the compelled testimony. That is a perfectly rational qualification to immunity: A grant of immunity is not a license to commit perjury. Thus, it was fully effective as to his first Grand jury testimony.

But in this case, the immunity was nonexistent, with respect to the final Grand Jury appearance at which the perjured testimony was given.

Lazaros had just finished testifying that he was unable to recall the key events of the 1967 Christmas party and the 1964 fight.

He was then told that he would be held in jail until he gave unequivocal testimony concerning those events.

But in giving unequivocal testimony, he would necessarily be providing evidence that his first testimony concerning inability to recall, had been perjury.

And conversely, that first testimony concerning inability to recall could be used—as it was used in this case—to support the claim that the definitive testimony was false.

And that could happen regardless whether the final testimony incriminated the agents or exonerated them.

This is yet another reason why no court can ever lawfully direct that a witness testify in a special manner, or to a specified effect. The judge must be content to assure that the witness does testify—that he gives an answer to every lawful question. The truth or falsity of that answer, must be dealt with in some manner other than by locking the defendant up until he agrees to testify that his first testimony was false.

Because the appellant was forced to testify without benefit of immunity after having claimed his privilege against self-incrimination, his compelled testimony cannot become the basis of a perjury charge.

VII.

PUNISHMENT IS BARRED BY THE DOCTRINE OF ENTRAPMENT

The defense of entrapment is, we suggest, conclusively established by the facts and arguments offered in support of the foregoing several counts.

The trial judge instructed the jury on the defense of entrapment. On the conceded facts of this case, deriving entirely from prosecution testimony, entrapment is established as a matter of law. Had the jury truly understood and applied the entrapment instruction, that instruction would have been tantamount to the direction of a not guilty verdict.

Entrapment as a defense to a perjury charge, may appear somewhat novel. But what greater entrapment could exist, than was employed here?

A federal agent spent hundreds of hours with the defendant, extracting a story of bribery. Where the defendant could not give names, the agent supplied them through the suggestive use of photographs. The defendant's request to view the subjects in the flesh in order to be sure of the identification, was disregarded.

A Grand Jury investigation commenced. The prosecutor importunes the defendant to repeat before the Grand Jury that the story had been borne out of extrinsic investigation. Defendant refused to testify.

The defendant was finally subpoenaed before the Grand Jury. Both the Grand Jury and the prosecutor were at that point, completely satisfied that the accusation was false; but they went to great lengths to make the defendant believe that the story had been corroborated. They went so far as to advise the judge—quite falsely—in the defendant's presence that they were investigating the accusation; that their investigation had been thwarted by the defendant's reluctance to testify; and that his testimony would contribute greatly to that investigation.

The defendant was thereby compelled to testify. He did so. He swore that he could no longer be sure whether the specific events had actually taken place according to the tenor of the prosecutor's questions to him.

He was then dragged back before the judge and confronted with his earlier statement to the investigator. The prosecutor argued that the claimed failure of recollection was necessarily false, in the light of that statement. Every effort was made to cause both the Court and the defendant

to believe that the federal government considered that statement truthful. Effectively, the prosecutor successfully argued that the defendant's testimony must be false and contemptous because it contradicted the statement given to the investigator.

The judge, at the prosecutor's request, sent the defendant to jail because he had given testimony different from the statements which he made to the investigator. The citation, although illegal, could be enforced; and defendant had a justified fear of death as a result.

The prosecutor's statements to the Court were in their essence, completely false. He had privately concluded, from other evidence, that it was the statement which was given to the investigator which was false. It was his secret objective to force the defendant to conform that statement in sworn testimony before the Grand Jury in order that the Grand Jury could idict the witness for perjury.

Accordingly, he generated a totally false set of circumstances which caused the defendant to believe that he was in imminent danger of protracted incarceration, and reasonable danger of death, unless he should confirm to the Grand Jury the statements given to the investigator.

There was no predisposition here to commit perjury. The defendant had moved mountains to avoid doing exactly that. In the opinion of the prosecutor himself, the defendant was simply trying to avoid committing perjury. It was the prosecutor's objective to make sure that he could commit the offense in order that he might be indicted for it.

So the defendant returned to the Grand Jury, and confirmed the statement given to the investigator. Every time he attempted to equivocate, the prosecutor brought him up

short. The "perjury" was then extracted in the following manner:

"Q. Directing your attention to the Christmas party in December of 1967 did you or did you not give an envelope to John Gardner containing $1,000?

"A. I don't want to be contemptuous. Tell me if I am, Mr. O'Leary. I don't want to use the words "I'm not sure". I think I did.

"Q. Directing your attention to that same Christmas party in December of 1967, did you or did you not give an envelope containing $1,000 to Ellis Lockwood?

"A. I think I did, yes.

"Q. Sir, you either did or didn't. Did you or didn't you?

"A. I would say I did.

"Q. I am not saying what you would say, I am asking you did you give an envelope to Ellis Lockwood at that Christmas party in December of 1967, which contained $1,000?

"A. I would say — yes.

"Q. You did?

"A. Yes."

"Q. Do you recall having this conversation with Mr. DeBoer on March 24, 1969:

"Q. 'Getto, Lockwood, Lee and Gardner came in early before the other guests and left after the other guests?'

"A. You can see in there, Mr. O'Leary, I think that was the way, yes.

"Q. I am not interested in what you think, Mr. Lazaros; is that the way it happened?

"Q. I'm not interested in what you say, did they come before the other guests and did they leave after the other guests or not?

"A. Not all of them leave after the other guests. Could have a couple of them left before.

The Witness: And I wish that time when I was talking to Mr. DeBoer that he would advise me that I have to be exact on every piece of information. That is why this problem now. Now I am trying to be the "T" those item which were then just a lot of talk between him and me, and I give him information which stopped with talk, and I am trying to be as accurate as I can now. I wasn't trying to be false at that time or anything like that, but now you pinpoint me and he didn't you see."

"Q. Mr. Lazaros, with respect to the envelopes that contained $1,000, did you make up the envelopes with the $1,000, or didn't you?

"A. Mr. O'Leary, I want to be truthful with you. I think I did.

"Q. I am not interested in whether you think you did or not. I am asking you, did you make up the envelopes with the $1,000 in them?

"A. Yes, I did.

The questioning proceeded with a literal bludgeoning, always accompanied by the unspoken threat of jail and possible death. The witness had already been sentenced to jail for claiming he could not remember, and was testifying under an opportunity to "purge" himself by stating that he did remember. Whenever the witness said "I think" or "I believe" or words to that effect, he was brought up short:

"I am not interested in what you think."

"I am not interested in what you say."

"I am not interested in whether you think you did."

"I am not saying what you would say; I am asking you."

"I am not interested in what you think."

"I am not interested in what you would say, Mr. Lazaros; were they there or weren't they there?"

"I am not interested in whether you believe you did or not. Did you or didn't you?"

"I am not interested in whether both could have."

"I am not interested in what you believe, Mr. Lazaros."

"I am not interested in 'looks like him'. Is that the man or isn't it?"

Ultimately, the following question and answer were extracted:

"Q. Are you positive you also gave an envelope at that time at the Christmas party in 1967 to John Gardner?

"A. Yes, sir."

That answer, the Grand Jury alleged, was perjury (Count 3).

And small wonder.

It was no great trick to extract perjury in those circumstances. Any lawyer could do much the same thing, given the same circumstances: A frightened witness, the fact (as opposed to mere threat) of a contempt adjudication, the right to interrogate in a hostile environment outside the presence of his lawyer, to question in a bullying manner, and to jail the witness and possibly cause his death, at any moment. Repeatedly, the witness pleaded for a chance to temporize:

"I don't want to be contemptuous. Tell me if I am Mr. O'Leary. I don't want to use the words, 'I am not sure'. I think I did."

"I don't want to be contemptuous, and tell me if I am. What I told Mr. DeBoer, what I told the court is some question in my mind."

"Am I being contemptuous, Mr. O'Leary? I don't know the difference."

Facially, this is a classic entrapment case. The prosecution acquired the desire to cause the witness to commit perjury. It literally conceived the offense. The witness did not want to do it. Using false pretenses, the prosecutor instituted a proceeding whose only purpose was to cause the witness to commit perjury. He created a situation and circumstances which forced the witness to believe that unless he swore to the Grand Jury that the DeBoer statement was true, the penalty, quite possibly including death, would be exacted quickly.

This was most emphatically not a simple case of a witness who preferred not to testify, but who if forced to testify, would rather perjure than tell the truth. We do not urge that such would constitute entrapment. But this was a witness, the very content of whose answers was dictated by the prosecutor's acts. This was a witness who had already given answers inconsistent with those now charged as perjury, and who was then told that those answers would cause him to be jailed; that he was being given one more chance to give different answers; and that the desired answers were those obtained from him in the course of the DeBoer interrogation.

The basic concept of entrapment was expressed within the first decision authoritatively to consider the issue:

> "No court should . . . lend its countenances to . . . contrivances for inducing a person to commit a crime . . ." *U.S.* v *Whittier*, CCED Mo. 1878, 28 F Cas 591, 594.

Both the Model Penal Code, Section 2.10 and the National Commission on Reform of Federal Criminal Laws (Comment on Entrapment, Section 702; Working Papers p. 316) predicate the entrapment defense on the supervisory authority of the courts and considerations of public policy.

Entrapment is demonstrated wherever it is shown that the conduct of the law enforcement authorities caused to be committed, a crime which would not have occurred but for their machinations *Sherman* v. *United States, (1958)* 356 U.S. 369, 372.

It may be considered that Lazaros already may have lied to DeBoer. But that is a vastly different thing from perjury. Moreover, the circumstances of the charge made here neither required nor permitted a complete exploration of the circumstances of the statement given to DeBoer. They do establish that the DeBoer statement was the end product of an interrogation process running over hundreds of hours, involving substantial encouragement to Lazaros, claims by DeBoer of extrinsic corroboration, and suggestive use of photographs. Lazaros himself vividly made the distinction between a willingness to talk to DeBoer and a willingness to testify falsely under authority in a judicial proceeding.

We have here a crime conceived and staged by the prosecutor. It was his objective to cause Lazaros to commit perjury, and he carefully contrived a set of false circumstances designed to accomplish exactly that. There was no slightest predisposition on the part of Lazaros to commit the offense, as must be shown where entrapment is established. *United States* v. *Viviano (2 Cir. 1971) 437 F. 2d 295, 298.* It would be idle to suggest that Lazaros' background had been completely praiseworthy; at the time in question, he was a police informer under state protection. But the defense of entrapment is not reserved to members of the Westchester Cycle and Saddle Club (Cf, *United States* v. *Costner, 6 Cir. 1966, 359, F. 2d 969, 973).* Entrapment into an act of arson, cannot be justified by a showing

that the defendant had committed a burglary on some other occasion. *Sherman* v. *U. S. (1958) 356 U. S. 369, 383* (Frankfurter concurrence). The very essense of despotic government is the rationale that government misconduct is proper when one is dealing with a "bad" man.

This was a crime which could not have been committed had the prosecutor not demanded its commission. That conduct cannot be rewarded with the imprisonment of the target individual.

The Court of Appeals relied heavily upon *Glasser* v. *United States 315 U.S. 457; Frazer* v. *U.S. 145 Fed. 2d 145, 149 Sixth Cir. 1944;* as well as other cases contained in pages 4, 5, and 6 of the Opinion Appendix A page 1a.

However, the court did not consider and should have referred to the case of *United States* v. *Sylvester A. Thayer cited at 214 Fed. Supp. 929,* decided in the United States District Court for the District of Colorado, decided February 19, 1963 wherein the Court considered almost the same situation as presented to this Court and came up with just the opposite result, that the defendant's priviledge of self incrimination is considerably broader than the government and the Court heretofore limited it. Further the methods employed in obtaining and reducing testimony show unfairness which quite apart from the Fifth Amendment renders information so obtained inadmissible.

VIII.

THE COURT IMPROPERLY IMPOSED CUMULATIVE SENTENCES ON THE DEFENDANT

The indictment consisted in twelve counts. Each count alleged that a false answer had been given to a question posed to Lazaros in the course of his last appearance before the Grand Jury.

On each count, a separate and cumulative sentence was imposed on the appellant.

That was a fundamental wrong. The government simply cannot subject a witness to protracted questioning on a single basic fact, and then distribute the false answers into separate counts in order to support separate cumulated sentences. *Gebhart* v. *United States (9 Cir. 1970) 422 F. 2d 281, 189.*

The length of the sentence to be imposed simply cannot be made to depend upon the ingenuity of the prosecutor in breaking down a given event into the largest number of questions. Lazaros' testimony, viewed most favorably to the government, consisted in a single essential lie: That bribes had been paid to certain agents.

All falsehoods uttered on a given occasion can be embraced in a single count of perjury, which is sustained by proof of any falsity therein alleged. *Stassi* v. *United States (5 Cir. 1968) 401 F. 2d 259, 262,* vacated on other grounds, *394, U.S. 310.*

Essentially, Lazaros testified that money had been passed to IRS agents at a Christmas party in 1967 and at a prize fight some years earlier. He was separately charged with perjury in regard to testimony that at the Christmas party:

Count 1—He had paid money to agent Ghetto.

Count 2—He had paid money to agent Gardner.

Count 3—He had paid money to agent Lockwood.

Count 4—He had paid money to agent Lee.

Count 5—Ghetto, Lockwood, Lee and Gardner had been present at the party.

Count 6—Ghetto, Lockwood, Lee and Gardner had remained at the party for a long time.

Count 7—He had paid money at the party to Cavanaugh.

Count 8—He had paid money at the party to Stone.

He was also charged separately with perjury in testifying that, at the prize fight:

Count 9—Ghetto had attended (perhaps a different fight).

Count 10—Dunleavy had attended.

Count 11—Ghetto had stayed at the scene of the fight for one day.

Count 12—Money had been paid to Ghetto and Dunleavy on that occasion.

Essentially, the testimony was a single story. At the very outer limit, it could be said that there were two events described, and that each somehow separately constituted perjury: The Christmas party, and the Cleveland fight.

But we note the government's pleaded claim of the scope of the investigation: Had agents taken bribes? The falsehood of the claim was a single act of perjury, regardless into how many questions and sub-questions the prosecutor might contrive to phrase his interrogation.

And it is nonsense to contend that a claim of bribery can be broken into three separate acts of perjury: (1) that the bribe-taker was present; (2) that he was given money; and, (3) that he then remained in the vicinity.

We presume that it may be termed a proper area of prosecutive discretion, to have indicted in one count or in twelve. But we cannot imagine that the exercise of that discretion controls the number of sentences that can be imposed, nor that the government is entitled to more than one satisfaction in these circumstances.

CONCLUSION

For these reasons this Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

GERALD M. FRANKLIN,
Attorney for Petitioner

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

PETER N. LAZAROS,
Defendant-Appellant.

ORDER

Before: MILLER, KENT* and LIVELY, Circuit Judges.

We have considered the petition for rehearing filed on behalf of the defendant-appellant, Peter N. Lazaros, and we find it to be without merit.

It is accordingly ORDERED and ADJUDGED that the said petition be and the same is hereby overruled.

ENTERED BY OREDR OF THE COURT.
JAMES A. HIGGINS
Clerk

*Judge W. Wallace Kent died May 28, 1973.

Appendix B

No. 72-1721

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
PETER N. LAZAROS,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed June 11, 1973.

Before: MILLER, KENT* and LIVELY, Circuit Judges.

MILLER, Circuit Judge. The defendant, Peter Lazaros, appeals his conviction by a jury on twelve counts of perjury in the District Court for the Eastern District of Michigan. He was sentenced to one year and a day on each count, to run consecutively.

During the state trial of a criminal associate, Joseph Barbara, on charges of extortion and rape of Lazaros' wife, the defendant became an informer for the prosecution. During th ensuing months Lazaros remained under heavy protection provided by the Michigan State Police. During this period Lazaros maintained a close contact with Donald DeBoer, an internal affairs investigator of the Internal Revenue Service. He made accusations against at least three IRS officials, Harris, McDonald and Olszewski. Also from photographs, Lazaros identified IRS agents Gardner, Lockwood, Lee, and Getto, as having accepted money from underworld figures. He also implicated certain former Detroit officials. DeBoer warned Lazaros that making a false statement to him was a violation of 18 U.S.C. § 1001, a felony for which Lazaros could be imprisoned for five years and fined up to $50,000.00.

*Judge Kent participated in the decision in this case and concurred in this opinion prior to his death on May 28, 1973.

A grand jury was convened on June 12, 1969, to investigate the accusations. On June 26, 1969, invoking the Fifth Amendment, he refused to testify. Over the next two months some 30 to 40 witnesses were called to testify before the grand jury, including DeBoer. Apparently a rift had developed between DeBoer and Edward O'Leary, the United States Attorney representing the government. DeBoer continued to believe Lazaros, while O'Leary concluded that no bribery had occurred. On August 21, 1969, Lazaros was recalled before the grand jury. In his first appearance on that day, he was asked about the bribery of certain governmental officials. He refused to testify, again asserting his Fifth Amendment rights. O'Leary then sought and obtained immunity under 18 U.S.C. § 2514 from Judge Thornton, United States District Judge for the Eastern District of Michigan. In his second appearance on August 21, Lazaros answered these same questions in an enigmatic and evasive manner. He was then returned to Judge Thornton, who held him in civil contempt, and remanded him to the custody of the federal marshal until such time as he would answer directly the questions propounded by the prosecutor.

Finally on the afternoon of August 21, Lazaros purged himself of the contempt by giving direct answers to the prosecutor's questions. Based on the answer to these questions, he was indicted for perjury.

Specifically, Lazaros testified that four Internal Revenue agents, Lockwood, Lee, Gardner and Getto, had accepted envelopes containing $1,000 each at a Christmas party given by Lazaros at the Kingsley Inn in Birmingham, Michigan, in December of 1967. Furthermore, he testified that the former Mayor of Detroit, Jerome Cavanagh, and the former purchasing agent of Detroit, Arthur Stone, accepted envelopes that contained money. Finally, Lazaros testified

that two IRS agents, Getto and Conrad, and a member of the Detroit police force, Dunleavy, received money under the pretext of a game of chance, after a prize fight that occurred in Cleveland in 1964. His testimony was that he was personally present at each of these exchanges.[1]

18 U.S.C. § 1621 provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not belive to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.[2]

Lazaros' main defense at trial was that his testimony was coerced, and therefore was not willful within the meaning of 18 U.S.C. § 1621. Lazaros argues that he was given a Hobson's choice. If, after he was in contempt for giving evasive answers, he had chosen to go to jail, he was in dan-

[1] The indictment is attached as Appendix One to this opinion.

[2] The essential elements of a violation of 18 U.S.C. § 1621 are the taking of an oath, in a case where a law of the United States authorizes the oath to be administered, to testify truly, and wilfully and contrary to such oath making a false statement, as to a material fact and which the defendant did not believe to be true. *United States* v. *Stone*, 429 F.2d 138, 140 (2d Cir. 1970).

ger for his life.[3] If he took the stand and testified that the bribery had never taken place, he could be convicted of a felony for giving false statements to a government official.[4] Finally, if he took the stand and retold his story that he had given to the IRS officials, he would be convicted of perjury. This explanation was presented to the jury under proper and unchallenged instructions to the effect that if defendant's statements before the grand jury were indeed made as the reult of coercion or duress they would not come within the ambit of the perjury statute. We find that there is sufficient evidence in the record to support the jury's conclusion that Lazaros' testimony was willfully false. *See Glasser* v. *United States,* 315 U.S. 457 (1942).

The further argument is made that Lazaros' testimony before the grand jury was not material. Consequently, even though false, the testimony may not be used as a basis for a perjury conviction. An aspect of the same theory of defense is the insistence that the inqury as to the bribery of the government officials was concluded by the time Lazaros was recalled to the stand on August 21, 1969. Finally, it is said that the reason he was recalled was to force him to commit perjury or to release his testimony to the public (a violation of the doctrine of grand jury secrecy), neither of which is a legitimate function of the grand jury.

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[3] He points out that a week before his testimony, another government informer had been killed by the administering of a cyanide cupcake while he was in the Wayne County jail. He testified that he felt that he would receive the same treatment were he confined there.

[4] Although DeBoer told Lazaros that giving him false statements was a felony, this was incorrect information. Lazaros apparently could not have been convicted under 18 U.S.C. § 1001 for any statements he made to DeBoer. *See e.g., Friedman* v. *United States,* 374 F.2d 363 (8th Cir. 1967).

In support of these theories the defendant relies on *Brown* v. *United States,* 245 F.2d 459 (8th Cir. 1957); *United States* v. *Cross,* 170 F.Supp. 303 (D.C.D.C. 1059); *United States* v. *Icardi,* 140 F.Supp. 383 (D.C.D.C. 1956). The defendant relies on the testimony of the prosecuting United States Attorney, Edward O'Leary, that by August 21, 1969, he had concluded that none of the officials accused by Lazaros had taken bribes and that all were innocent of the charges made against them. Also two grand jurors testified that the investigation was nearly complete when Lazaros was recalled.

We believe that these theories of defense are without merit. The test of materiality is "whether the false testimony was capable of influencing the tribunal on the issue before it." *Fraser* v. *United States,* 145 F.2d 145, 149 (6th Cir. 1944) *quoting Blackmon* v. *United States,* 108 F.2d 572, 573 (5th Cir. 1940). Furthermore, "materiality refers to testimony that will legally evidence the propositions to be proved." *Fraser* v. *United States, supra* at 149, *quoting United States* v. *Slutzky,* 79 F.2d 504, 506 (3rd Cir. 1935).

> However, materiality of statements made in a grand jury investigation may more readily appear than that of similar evidence offered on an issue in civil or criminal litigation, since the purpose of the investigation is to get at facts which will enable the grand jury to determine whether formal charges should be made against someone rather than prove matters directly at issue. Leads to further inquiry may be of material worth to an investigation. Thus the test of materiality is whether the false testimony has the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation.

United States v. *Stone*, 429 F.2d 138, 140 (2d Cir. 1970) (citations omitted); *See United States* v. *Manfredonia*, 414 F.2d 760, 764 (2d Cir. 1969); *United States* v. *Henderson*, 185 F.2d 189, 191 (7th Cir. 1950).[5]

Lazaros was the main accuser of the government officials. It was because of his accusations that the invetigation was initiated and the grand jury convened. His testimony was relevant to the bribery charges under investigation. Regardless of the actual beliefs of the United States Attorney, the grand jury was entitled to hear Lazaros' testimony. Unless protected by privilege, the "public [through the grand jury] . . . has a right to every man's evidence." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972).

Furthermore the testimony sought from Lazaros was within the legitimate scope of the grand jury's functions.

> [T]he grand jury . . . has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.

Branzburg v. *Hayes, supra* at 687 (footnotes omitted).

> Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether

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[5]The testimony need not actually impede the grand jury investigation. The question, to be material, need only pertain to the same general subject matter as the investigation. *Vitello* v. *United States*, 425 F.2d 416, 424 (9th Cir. 1970); *see United States* v. *Tyrone*, 451 F.2d 16, 18 (9th Cir. 1971).

> any particular individual will be found properly subject to an accusation of crime."

Branzburg v. *Hayes, supra* at 688, *quoting Blair* v. *United States,* 250 U.S. 273, 282 (1919). *See United States* v. *Neff,* 212 F.2d 297, 301 (3rd Cir. 1954).

> A grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed;

United States v. *Stone, supra* at 140.

> Obviously many investigations would be incomplete and superficial if the grand jury failed to call those persons who appear to know the most about matters under inquiry.

United States v. *Sweig,* 441 F.2d 115, 121 (2d Cir. 1971).[6]

[6] Reliance on *Brown* v. *United States,* 245 F.2d 459 (8th Cir. 1957); *United States* v. *Cross,* 170 F. Supp. 303 (D.C. D.C. 1959); *United States* v. *Icardi,* 140 F. Supp. 383 (D.C. D.C. 1956), is misplaced. In *Cross* and *Icardi,* both defendants were convicted of perjury for testimony before a Congressional committee. In both cases the court held that the testimony that was given was not pursuant to any valid legislative purpose, but rather was publicly to try and convict the particular individual of the allegations against him. Obviously, the legislative ivestigatory powers cannot be used as a substitute for the judicial process, particularly when the individual is subsequently convicted of perjury on the basis of the testimony that he gave before the legislative committee.

Brown presents a different situation. In that case the defendant was convicted of perjury based on testimony before a grand jury sitting in Nebraska. The testimony was given in regard to activity that occurred in St. Louis, Missouri. There was no connection between any of the alleged criminal activity and Nebraska, other than the fact that the grand jury happened to be sitting there. The Eighth Circuit held that the Nebraska grand jury had no jurisdiction to investigate criminal conduct occurring in Missouri, and consequently, the testimony before the grand jury could not be used to support a perjury conviction. This is obviously not the case here. The grand jury was investigating bribery that had occurred primarily within the jurisdiction in which the grand jury was sitting. The perjurious testimony related to incidents that occurred within that jurisdiction. The grand jury had both subject matter and territorial jurisdiction over the matters to which the perjurious testimony pertains.

We conclude that Lazaros' testimony before the grand jury was clearly material and well within the legitimate scope of its inquiry.[7]

Finally, the defendant asserts that his conviction should be barred by the doctrine of entrapment as a matter of law.

> Unlawful entrapment involves the manufacture of crime by law enforcement officers for the purpose of procuring the prosecution of an otherwise innocent person * * *.
>
> Thus, where a person has no previous intent, or no previous purpose to violate the law, but he is induced or persuaded by a law enforcement officer to commit the crime, he is the victim of an unlawful entrapment with respect to that particular crime, and the law as a matter of policy forbids his conviction in such a case * * *.

United States v. *Curtis*, 430 F.2d 1159, 1161 (6th Cir. 1970); *Sherman* v. *United States*, 356 U.S. 369 (1958); *Sorrels* v. *United States*, 287 U.S. 435 (1932).

It is true that Lazaros was forced to tell what he knew about the alleged events. He was not forced, induced, or coerced, however, into giving *false* testimony before the grand jury. Lazaros urges that he had no predisposition to

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[7] As a corollary the defendant theorizes that the grant of immunity by the district court was void because the district court's jurisdiction was fraudulently invoked. The defendant points out that in his application for immunity, the United States Attorney recited several facts, specifically alleging that the grand jury was presently investigating the possibility of bribery; and that Lazaros' testimony was material to this investigation. These assertions, according to the defendant, were false. We find otherwise on the record before us. We find that the grand jury's investigation of the bribery was not complete when Lazaros was called to testify on August 21, 1969, and that the grand jury investigation was not fraudulently invoked.

commit this crime. He points out that he refused initially to testify, and finally testified only under threat of being jailed for contempt of court. This argument misses the point because Lazaros, as we have said, was only compelled to state what he knew, not to testify falsely.

For these reasons we feel that entrapment was not established as a matter of law, and that the issue was properly submitted to the jury.

The defendant raises two final issues. First, he argues that the indictment was defective because it divides a single crime into twelve different ones. Also it is argued that counts 9 and 11 do not state an offense.

As to the first issue, the defendant relies on *Gebhard* v. *United States,* 422 F.2d 281 (9th Cir. 1971). In *Gebhard* the court stated:

> If he in fact told separate lies, each of which could have hindered the grand jury in its investigation, then he could properly be separately charged for each lie. On the other hand, we do not think it proper that the government bludgeon a witness who is lying by repeating and rephrasing the same question, thus creating more possible perjury counts.
>
> Single punishment for a single lie should suffice.

422 F.2d at 289-90; *See United States* v. *Tyrone, supra,* 451 F.2d at 18. The government concedes that under *Gebhard,* the sentences imposed on counts 5, 6 and 11 should be vacated but that the sentences on the remaining counts should be affirmed. We agree with this position. Count 9, in our view does state a separate offense.

The sentences imposed on counts 5, 6 and 11 are accordingly vacated and the convictions and sentences as to all remaining counts are hereby affirmed.

APPENDIX

INDICTMENT

[Record Item 1]

(Filed August 26, 1969)

The Grand Jury charges:

COUNT ONE

1. On or about August 21, 1969, in the Eastern District of Michigan, Southern Division, Peter N. Lazaros, having duly taken an oath before a competent tribunal, that is, the Grand Jury of the United States of America, duly impaneled and sworn in the United States District Court for the Eastern District of Michigan, and inquiring for that District in a case then and there pending before the said Grand Jury in which a law of the United States authorizes an oath to be administered, that he would testify truly, did wilfully and knowingly and contrary to said oath, state material matters which he did not believe to be true, that is to say:

2. At the time and place aforesaid the Grand Jury was conducting an investigation to determine whether there had been committed in the Eastern District of Michigan, and elsewhere, violations of the laws of the United States, to wit: bribery of public officials in violation of Section 201, Title 18, United States Code.

3. It was material to this Grand Jury investigation to determine, among other things, whether Anthony Getto, also known as Tony Getto, an Internal Revenue Service employee, John Gardner, an Internal Revenue Service employee, Ellis Lockwood, an Internal Revenue Service

employee, James Lee, an Internal Revenue Service employee, Jerome P. Cavanagh, Mayor of the City of Detroit, and Arthur Stone received any money or thing of value at the Kingsley Inn, 1475 Woodward, Bloomfield Hills, Michigan, on December 17, 1967, at which time and place Peter N. Lazaros was also present; further, it was material to this Grand Jury investigation to determine, among other things, whether the aforementioned individuals were present at the Kingsley Inn, 1475 Woodward, Bloomfield Hills, Michigan, on December 17, 1967, at which time and place Peter N. Lazaros was also present.

4. At the time and place alleged in paragraph 1 herein, Peter N. Lazaros appeared as a witness before the aforesaid Grand Jury, and then and there, being under oath, testified falsely before the Grand Jury with respect to the aforesaid material matters as follows:

> "Q. Directing your attention to the Christmas party in December of 1967, did you or did you not give an envelope to Anthony Getto containing a thousand dollars?
>
> A. I did."

5. The aforesaid testimony of Peter N. Lazaros, as he then and there well knew and believed, was not true in that Anthony Getto, also known as Tony Getto, an Internal Revenue Service employee, John Gardner, an Internal Revenue Service employee, Ellis Lockwood, an Internal Revenue Service employee, James Lee, an Internal Revenue Service employee, Jerome P. Cavanagh, Mayor of the City of Detroit, and Arthur Stone did not receive any money or thing of value at the Kingsley Inn, 1475 Woodward, Bloomfield Hills, Michigan, on December 17, 1967; and,

further, the aforesaid testimony of Peter N. Lazaros as he then and there well knew and believed, was not true in that the aforementioned individuals were not present at the Kingsley Inn, 1475 Woodward, Bloomfield Hills, Michigan, on December 17, 1967.

COUNT TWO

The Grand Jury further charges:

1. The Grand Jury re-alleges all of the allegations of Paragraph 1 of Count One, which is hereby incorporated by reference.

2. The Grand Jury re-alleges all of the allegations of Paragraph 2 of Count One, which is hereby incorporated by reference.

3. The Grand Jury re-alleges all of the allegations of Paragraph 3 of Count One, which is hereby incorporated by reference.

4. At the time and place alleged in Paragraph 1 herein, Peter N. Lazaros appeared as a witness before the Grand Jury, and then and there, being under oath, testified falsely before the Grand Jury with respect to the aforesaid material as follows:

> "Q. What about Mr. Gardner, did you or did you not give an envelope containing $1,000 at this Christmas party to Mr. Gardner?
>
> A. Yes.
>
> Q. You did?
>
> A. Yes."

5. The Grand Jury re-alleges all of the allegations of Paragraph 5 of Count One, which is hereby incorporated by reference.

COUNT THREE

The Grand Jury further charges:

1. The Grand Jury re-alleges all of the allegations of Paragraph 1 of Count One, which is hereby incorporated by reference.

2. The Grand Jury re-alleges all of the allegations of Paragraph 2 of Count One, which is hereby incorporated by reference.

3. The Grand Jury re-alleges all of the allegations of Paragraph 3 of Count One, which is hereby incorporated by reference.

4. At the time and place alleged in Paragraph 1 herein, Peter N. Lazaros appeared as a witness before the Grand Jury, and then and there, being under oath, testified falsely before the Grand Jury with respect to the aforesaid material as follows:

> "Q. Are you positive you gave an envelope containing $1,000 at the Christmas party in 1967 to Ellis Lockwood?
>
> A. Yes, sir."

5. The Grand Jury re-alleges all of the allegations of Paragraph 5 of Count One, which is hereby incorporated by reference.

COUNT FOUR

The Grand Jury further charges:

1. The Grand Jury re-alleges all of the allegations of Paragraph 1 of Count One, which is hereby incorporated by reference.

2. The Grand Jury re-alleges all of the allegations of

Paragraph 2 of Count One, which is hereby incorporated by reference.

3. The Grand Jury re-alleges all of the allegations of Paragraph 3 of Count One, which is hereby incorporated by reference.

4. At the time and place alleged in Paragraph 1 herein, Peter N. Lazaros appeared as a witness before the Grand Jury, and then and there, being under oath, testified falsely before the Grand Jury with respect to the aforesaid material as follows:

> "Q. Now, Mr. Lazaros, let's go back to James Lee. Did you give James Lee an envelope with $1,000 or didn't you, at the Christmas party in December, 1967?
>
> A. Yes, I did."

5. The Grand Jury re-alleges all of the allegations of Paragraph 5 of Count One, which is hereby incorporated by reference.

COUNT FIVE

The Grand Jury further charges:

1. The Grand Jury re-alleges all of the allegations of Paragraph 1 of Count One, which is hereby incorporated by reference.

2. The Grand Jury re-alleges all of the allegations of Paragraph 2 of Count One, which is hereby incorporated by reference.

3. The Grand Jury re-alleges all of the allegations of Paragraph 3 of Count One, which is hereby incorporated by reference.

4. At the time and place alleged in Paragraph 1 herein, Peter N. Lazaros appeared as a witness before the Grand Jury, and then and there being under oath, testified falsely before the Grand Jury with respect to the aforesaid material as follows:

> "Q. But all of these Internal Revenue Service employees—and I mean Getto, Lockwood, Lee and Gardner—were at the party in each other's presence, is that correct?
>
> A. Yes."

5. The Grand Jury re-alleges all of the allegations of Paragraph 5 of Count One, which is hereby incorporated by reference.

COUNT SIX

The Grand Jury further charges:

1. The Grand Jury re-alleges all of the allegations of Paragraph 1 of Count One, which is hereby incorporated by reference.

2. The Grand Jury re-alleges all of the allegations of Paragraph 2 of Count One, which is hereby incorporated by reference.

3. The Grand Jury re-alleges all of the allegations of Paragraph 3 of Count One, which is hereby incorporated by reference.

4. At the time and place alleged in Paragraph 1 herein, Peter N. Lazaros appeared as a witness before the Grand Jury, and then and there, being under oath, testified falsely before the Grand Jury with respect to the aforesaid material as follows:

> "Q. Well, Getto, Lockwood, Lee and Gardner were there for a long time, is that correct?

A. I say yes.

Q. From the start of the party to about the end of the party, is that correct?

A. That is correct."

5. The Grand Jury re-alleges all of the allegations of Paragraph 5 of Count One, which is hereby incorporated by reference.

COUNT SEVEN

The Grand Jury further charges:

1. The Grand Jury re-alleges all of the allegations of Paragraph 1 of Count One, which is hereby incorporated by reference.

2. The Grand Jury re-alleges all of the allegations of Paragraph 2 of Count One, which is hereby incorporated by reference.

3. The Grand Jury re-alleges all of the allegations of Paragraph 3 of Count One, which is hereby incorporated by reference.

4. At the time and place alleged in Paragraph 1 herein, Peter N. Lazaros appeared as a witness before the Grand Jury, and then and there, being under oath, testified falsely before the Grand Jury with respect to the aforesaid material as follows:

"Q. Are you positive that either you or Joe Barbara in your presence gave an envelope to Mayor Cavanagh at that same party, at the Kingsley Inn in December 1967, containing $3,000?

A. Yes, sir."

5. The Grand Jury re-alleges all of the allegations of Paragraph 5 of Count One, which is hereby incorporated by reference.

COUNT EIGHT

The Grand Jury further charges:

1. The Grand Jury re-allges all of the allegations of Paragraph 1 of Count One, which is hereby incorporated by reference.

2. The Grand Jury re-alleges all of the allegtions of Paragraph 2 of Count One, which is hereby incorporated by reference.

3. The Grand Jury re-alleges all of the allegations of Paragraph 3 of Count One, which is hereby incorporated by reference.

4. At the time and place alleged in Paragraph 1 herein, Peter N. Lazaros appeared as a witness before the Grand Jury, and then and there, being under oath, testified falsely before the Grand Jury with respect to the aforesaid material as follows:

> "Q. What about Art Stone, did you give Art Stone an envelope which contained $500?
>
> A. As I said, I give him money, but I don't know if it was in an envelope. Today I can't remember if it was in an envelope.
>
> Q. Did you give him $500?
>
> A. Yes."

5. The Grand Jury re-alleges all of the allegations of Paragraph 5 of Count One, which is hereby incorporated by reference.

COUNT NINE

The Grand Jury further charges:

1. The Grand Jury re-alleges all of the allegations of

Paragraph 1 of Count One, which is hereby incorporated by reference.

2. The Grand Jury re-alleges all of the allegations of Paragraph 2 of Count One, which is hereby incorporated by reference.

3. It was material to this Grand Jury investigation to determine whether one Anthony Getto, also known as Tony Getto, an Internal Revenue Service employee, Vernon Conrad, an Internal Revenue Service employee, and James Dunleavy, a Detroit Police Department officer, attended a boxing match between Joey Giardello and Rocky Rivaro in Cleveland, Ohio, in the Spring of 1964, at which time and place Peter N. Lazaros was also present; furher, it was material to this Grand Jury investigation to determine whether the aforementioned individuals, at or about the time the aforementioned individuals attended the aforesaid boxing match, received money or a thing of value at the Sahara Motor Hotel, 3201 Euclid Avenue, Cleveland, Ohio, at which time and place Peter N. Lazaros was also present.

4. At the time and place alleged in Paragraph 1 herein, Peter N. Lazaros appeared as a witness before the Grand Jury, and then and there, being under oath, testified falsely before the Grand July with respect to the aforesaid material as follows:

> "Q. (Interposing) Wait a minute, Mr. Lazaros, did you go to both Joey Giardello-Rocky Rivaro fights or one fight?
>
> A. I don't remember, Mr. O'Leary.
>
> Q. Well, did Anthony Getto go to both fights or one fight?
>
> A. He was in one of them."

5. The aforesaid testimony of Peter N. Lazaros, as he then and there well knew and believed, was not true in that Anthony Getto, also known as Tony Getto, an Internal Revenue Service employee, Vernon Conrad, an Internal Revenue Service employee, and James Dunleavy, a Detroit Police officer, did not receive any money or thing of value at the Sahara Motor Motel, 3201 Euclid Avenue, Cleveland, Ohio, in the Spring of 1964; further, the aforesaid testimony of Peter N. Lazaros, as he then and there well knew and believed, was not true in that the aforementioned were not present at a boxing match between Joey Giardello and Rocky Rivaro in Cleveland, Ohio, in the Spring of 1964.

COUNT TEN

The Grand Jury further charges:

1. The Grand Jury re-alleges all of the allegations of Paragraph 1 of Count One, which is hereby incorporated by reference.

2. The Grand Jury re-alleges all of the allegations of Paragraph 2 of Count One, which is hereby incorporated by reference.

3. The Grand Jury re-alleges all of the allegations of Paragraph 3 of Count Nnine, which is hereby incorporated by reference.

4. At the time and place alleged in Paragraph 1 herein, Peter N. Lazaros appeared as a witness before the Grand Jury, and then and there, being under oath, testified falsely before the Grand Jury with respect to the aforesaid material as follows:

"Q. Do you know Inspector James Dunleavy, formerly of the Detroit Police Deparment?

A. Very well.

Q. Was Inspector Dunleavy at that fight?

A. Yes, he was."

5. The Grand Jury re-alleges all of he allegations of Paragraph 5 of Count Nine, which is hereby incorporated by reference.

COUNT ELEVEN

The Grand Jury further charges:

1. The Grand Jury re-alleges all of the allegations of Paragraph 1 of Count One, which is hereby incorporated by reference.

2. The Grand Jury re-alleges all of the allegations of Paragraph 2 of Count One, which is hereby incorporated by reference.

3. The Grand Jury re-alleges all of the allegations of Paragraph 3 of Count Nine. which is hereby incorporated by reference.

4. At the time and place alleged in Paragraph 1 herein, Peter N. Lazaros appeared as a witness before the Grand Jury, and then and there, being under oath, testified falsely before the Grand Jury with respect to the aforesaid material as follows:

"Q. You came back from the fight on Saturday; the fight was on Friday night, isn't that correct?

A. I don't remember if it was on Friday, but if you say it was — I don't know the dates there. I stayed — we stayed one day over, yes.

Q. Did Mr. Getto also stay one day over?

A. Yes."

5. The Grand Jury re-alleges all of the allegations of Paragraph 5 of Count Nine, which is hereby incorporated by reference.

COUNT TWELVE

The Grand Jury further charges:

1. **The Grand Jury re-alleges all of the allegations of Paragraph 1 of Count One, which is hereby incorporated by reference.**

2. **The Grand Jury re-alleges all of the allegations of Paragraph 2 of Count One, which is hereby incorporated by reference.**

3. **The Grand Jury re-alleges all of the allegations of Paragraph 3 of Count Nine, which is hereby incorporated by reference.**

4. At the time and place alleged in Paragraph 1 herein, Peter N. Lazaros appeared as a witness before the Grand Jury, and then and there, being under oath, testified falsely before the Grand Jury with respect to the aforesaid material as follows:

> "Q. You say the money go from—or you saw the money go to Vernon Conrad and Tony Getto and Inspector Duneavy?
>
> A. Yes.
>
> Q. Is that correct?
>
> A. Yes.
>
> Q. And this was in a room at the Sahara Motel, is that correct?
>
> A. Yes, I can describe you the room if you want me to.
>
> Q. Was this on the same night of the fight or was this on the following day?
>
> A. I think it was on the following day."

5. The Grand Jury re-alleges all of the allegations of Paragraph 5 of Count Nine, which is hereby incorporated by reference.

This is a True Bill.
Charles L. Easton
Foreman

SUPREME COURT, U. S.

FILED

JAN 17 1974

MICHAEL RODAK, JR., CLERK

No. 73-624

In the Supreme Court of the United States

OCTOBER TERM, 1973

PETER N. LAZAROS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 480 F. 2d 174.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1973. A petition for rehearing was denied on September 10, 1973. The petition for a writ of certiorari was filed on October 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly convicted of testifying falsely before the grand jury on August 21, 1969, concerning accusations that he had bribed or observed the bribery of public officials.

STATEMENT

A twelve-count indictment returned in the United States District Court for the Eastern District of Michigan on August 26, 1969, charged petitioner with having committed perjury before a grand jury which was conducting an investigation to determine whether public officials had been bribed (A. 2–13).[1] After a jury trial, petitioner was convicted on all counts and was sentenced to twelve consecutive terms of imprisonment for a year and a day (A. 22–23). The court of appeals vacated the convictions and sentences on three counts, and affirmed the remainder (Pet. App. B).

The evidence established that in November 1968 petitioner, who was at the time under investigation by the Audit and Intelligence Division of the Internal Revenue Service and had been formally charged in an Oakland County, Michigan, state court with having obtained money under false pretenses (A. 105, 122–123, 137, 181),[2] accused certain IRS and local officials

[1] "A." designates references to petitioner's appendix filed in the court below, a copy of which is being lodged with the Clerk of this Court.

[2] During the subsequent investigations, petitioner repeatedly asked that these charges be dismissed in exchange for his cooperation (A. 123–124, 169, 182).

of crimes and improprieties relating to their official duties. Between November 1968 and April 3, 1969, petitioner gave IRS inspector DeBoer and his superior detailed information concerning bribes allegedly given to IRS agents. (A. 35–37, 40–41, 46, 48, 57, 107–116, 118).[3] Additionally, he implicated in bribery transactions Detroit Mayor Cavanaugh, Detroit Purchasing Agent Stone, and Detroit Police Inspector Dunleavy (A. 36, 39, 44, 54–57, 62).

Petitioner's allegations, which he also released to the news media, led to extensive state and federal investigations. The grand jury began its investigation on June 12, 1969. On that day, petitioner appeared at the federal building but left without testifying, stating that he had to return home because his wife was ill (A. 75, 149, 156). On June 26, 1969, petitioner appeared before the grand jury pursuant to subpoena and declined to answer any questions, asserting his privilege against self-incrimination (A. 80–81). Between June 26, 1969, and August 21, 1969, when he

[3] For example, on December 18, 1968, petitioner told DeBoer that IRS employees Lee, Gardner, McDonald, and Harris were "connections for the outfit" (A. 107–109). On February 12, 1969, after looking at pictures of IRS employees, petitioner selected a picture of IRS Agent Getto as being "the tip-off man for the outfit." On February 25, 1969, petitioner informed DeBoer that he had seen an IRS employee, known to him as "J. Brown" (subseqently identified by petitioner from a photograph as IRS Agent Conrad), take a bribe in 1964. (A. 54–56, 113–114). On February 27, 1969, appellant, in the presence of his brother and an FBI agent, described to DeBoer an instance when IRS Agent Lockwood received $3,000 upon removing a file from the federal building in Detroit and giving it to named individuals (A. 114–115).

again appeared before the grand jury, some twenty-four to forty witnesses testified (A. 82, 150).

On August 21, 1969, petitioner appeared before the grand jury three times. On the first occasion, at 9:40 a.m., he refused to answer any questions, again asserting his privilege against self-incrimination (A. 24–30). Thereupon, petitioner appeared before the district judge and was granted transactional immunity under 18 U.S.C. 2514 and ordered to answer the questions which he had refused to answer (A. 86–89). Following the grant of immunity, petitioner made a second appearance before the grand jury. It soon became apparent that petitioner's responses were deliberately evasive (A. 31–37).[4] Petitioner was brought before the court again at approximately 11:45 a.m. After listening to petitioner's grand jury testimony and determining that his answers were "extremely evasive" (A. 97), the district judge adjudged him in contempt of court and directed that he be confined "so long as he refused to answer the questions put to him." Upon petitioner's request that he be given the opportunity that afternoon to purge himself of contempt, the court allowed him to spend a ninety minute lunch break with his attorneys prior to his third appearance before the grand jury, at 2:00 p.m. (A. 97–100). During this interval, petitioner appeared in a television interview and said: "Well, I will answer their questions in such a manner that I won't be contemptuous and I will make sure that what I said—what I say—is exactly

[4] At trial, petitioner admitted he deliberately gave evasive answers (A. 241).

what happened. * * * I do know exactly what happened. So that's what I'm going to do" (A. 273).

In his third grand jury appearance, petitioner testified that Mayor Cavanaugh, Purchasing Agent Stone, and named IRS employees received money in amounts of $500–$3,000 from him or in his presence at a Christmas party given by him in 1967. He also testified that Police Inspector Dunleavy and named IRS employees attended a boxing match at Cleveland, Ohio, in the spring of 1964, and on that occasion, in petitioner's presence, they received money from named individuals at the Sahara Motel, Cleveland (A. 39–67).[5]

Between August 21 and August 26, when petitioner was indicted, six or seven witnesses, including persons accused of taking bribes, appeared before the grand jury (A. 69).

Evidence at trial established that none of the alleged bribe takers had attended the prize fight in 1964 or the Christmas party in 1967. Petitioner, who prior to completion of his grand jury testimony had in no

[5] Following his third grand jury appearance, petitioner appeared at 4 p.m. before Judge Thornton, who adjourned the matter until August 25th, so that he might study the transcript and decide whether petitioner had purged himself of contempt. On August 25th Judge Thornton, a "[f]rom a careful analysis of the transcript," found that (1) the subject matter covered by the questions and answers was within the scope of the investigation being conducted by the grand jury; (2) the questions of the prosecutor were unambiguous; (3) although a part of petitioner's testimony was wilfully evasive, some of petitioner's responses were direct answers to questions. On this basis, Judge Thornton concluded that petitioner had purged himself of contempt (A. 101–102).

way indicated that any of his bribery accusations were false (A. 121, 176, 211–212), contended at trial that he had been entrapped and coerced by government agents to commit perjury (A. 244).*

ARGUMENT

1. The central thrust of petitioner's argument is that the grand jury investigation was staged and manipulated by government agents in order to force him to commit perjury against his will. This claim both mistakes the nature of the grand jury inquiry and distorts the facts of record.

(a) In *Branzburg* v. *Hayes,* 408 U.S. 665, this Court recently restated the role and function of the grand jury. It pointed out that the grand jury "has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Id.* at 686–687. In carrying out this role, the grand jury has extensive powers to investigate. As observed in *Branzburg* (*id.* at 688):

> Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments its investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and

* Trial counsel conceded early in the trial that petitioner's accusations were false and that he would so testify when he took the stand (Tr. 262, 265). Petitioner did testify that his grand jury allegations were lies and that he had no knowledge that any of the accused, except Cavanaugh and one IRS agent, had taken bribes (A. 245–248). In his petition for a writ of certiorari, petitioner concedes that he perjured himself before the grand jury (Pet. 13).

> inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." * * * Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that "the public * * * has a right to every man's evidence" except for those persons protected by a constitutional, common-law, or statutory privilege * * * is particularly applicable to grand jury proceedings. [Citations omitted.]

See also *United States* v. *Dionisio,* 410 U.S. 1; *United States* v. *Mara,* 410 U.S. 19; *United States* v. *Stone,* 429 F. 2d 138 (C.A. 2); *United States* v. *Winter,* 348 F. 2d 204, 208 (C.A. 2), certiorari denied, 382 U.S. 995; *United States* v. *Calandra,* No. 72–734, decided January 8, 1974.

The grand jury here was clearly entitled to petitioner's evidence. He was the person who had triggered the investigation with accusations of the commission of crimes, an area where the common law has long recognized the duty of a citizen to furnish information. *Branzburg, supra,* 408 U.S. at 691. The grand jury's investigation would not have been fully carried out if he and all other witnesses had not been examined to find out if the bribery crimes had been committed. *Id.* at 701–702. In the instant case, petitioner claimed to have first hand knowledge of the commission of crimes and had publicly accused federal and local officials of bribery. The government therefore was clearly correct in convening a grand jury to in-

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vestigate whether the elected and appointed officials named by petitioner were in fact corrupt. The grand jury had a duty to investigate thoroughly the truth or falsity of petitioner's statements to federal investigators. See *United States* v. *Stone, supra,* 429 F. 2d at 140. The investigation team had corroborated some of petitioner's statements. Moreover, five grand jury witnesses had also substantiated some aspects of his allegations. If the jurors had terminated their investigation before he testified and before they had determined the truth or falsity of his bribery charges, they would have prematurely relinquished their proper investigatory function. See *United States* v. *George,* 444 F. 2d 310 (C.A. 6). Moreover, the failure to call petitioner as a witness after his public accusations of bribery of public officials would have created the appearance of impropriety. See *United States* v. *Sweig,* 441 F. 2d 114, 121 (C.A. 2), certiorari denied, 403 U.S. 932.

In short, there is no reason in the setting of this case why the grand jury should not have required petitioner's testimony.

(b) Petitioner also incorrectly alleges that the grand jury was simply the improper tool of a prosecutorial effort to convict petitioner of perjury. It is claimed in this regard (Pet. 12–29) that the grand jury investigation of petitioner's bribery accusations had terminated prior to his perjurious testimony on August 21, 1969. But seven witnesses, including alleged bribe takers Cavanaugh and Getto, testified after August 21, 1969. At this time, the IRS team of investi-

gators was still checking petitioner's accusations and was still supplying the prosecutors with names of persons who had information regarding his accusations. The accused IRS officials were still suspended. The grand jurors had simply not decided, prior to petitioner's testimony, whether the accused officials had accepted bribes.

Petitioner nevertheless argues that because prosecutor O'Leary concluded, prior to August 21, 1969, that petitioner's accusations were unfounded, the grand jury investigation, could not be considered bona fide as of August 21. But if the grand jurors, who as yet were unconvinced the alleged bribe takers were innocent (A. 74, 77), had ceased their investigation simply because an individual prosecutor had become personally convinced of their innocence, the jurors would have abdicated their function of examining every available clue and every witness. *Branzburg, supra,* 408 U.S. at 701. Whatever the reason for O'Leary's belief, the jurors had not made up their minds prior to petitioner's testimony.[7]

The cases upon which petitioner relies, *United States* v. *Icardi,* 140 F. Supp. 383 (D.D.C.), and *United States* v. *Cross,* 170 F. Supp. 303 (D.D.C.), are not in point, since they were prosecutions for

[7] There is accordingly no merit to petitioner's repeated contention (Pet. 12, 27) that the prosecutor misrepresented the situation to the court when petitioner was granted immunity and then placed in contempt. Whatever the personal views of the prosecutor, he had the duty to assure that the investigative function of the grand jury was not blunted; his actions merely carried out this purpose.

perjury committed before a legislative committee.[8] As this Court has stated in considering another grand jury inquiry (*Branzburg, supra,* 408 U.S. at 699–700):

> We do not deal, however, with a governmental institution that has abused its proper function, as a legislative committee does when it "expose[s] for the sake of exposure."

Brown v. *United States,* 245 F. 2d 549 (C.A. 8), is also readily distinguishable. In *Brown,* a Nebraska grand jury had the defendant brought without a subpoena from Pennsylvania to Nebraska, where he was questioned before the grand jury about events occurring some four years previously in Missouri. *Id.* at 551, 553. He was subsequently indicted and found guilty on four counts of perjury. The court of appeals held that (*id* at 554) where the evidence established beyond all reasonable doubt that a Nebraska grand

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[8] In both cases, the appearance of the defendant had not been arranged for any legitimate congressional investigation. When Icardi testified, the committee was not functioning as a competent tribunal (140 F. Supp. at 388) and, even assuming it was so functioning, Icardi's false answers did not relate to a "material matter," the test of which is "whether the false testimony was capable of influencing the tribunal on the issue before it." *Ibid.* In *Cross,* the defendant, in his initial testimony before a Senate committee, had denied he was present during the assault of a union member. Later, the committee recalled Cross for the purpose of emphasizing the untruthfulness of his prior denial. Subsequently Cross was indicted for committing perjury during his second appearance before the committee. The court held that the perjury indictment was founded on testimony in response to questions which were not asked for the purpose of eliciting facts material to the committee's investigation (170 F. Supp. at 310). In the instant case, peti-

jury caused defendant to be brought before it for the sole purpose of extracting testimony upon which defendant could be prosecuted for perjury and "without any purpose of obtaining from him any evidence upon which, in whole or in part, it could find a true bill against anyone for any offense committed in whole or in part in Nebraska," such grand jury was acting beyond its powers, and answers of defendant, even if false, could not be made the basis of a prosecution.

Here, by contrast, there was a bona fide investigation, and the grand jury in Detroit was acting within its powers and within its jurisdiction. It was considering bribery transactions involving Michigan residents and occurring, for the most part, within Michigan. It could therefore have properly returned bribery indictments against these officials. Nor was its inquiry limited by the fact that the prosecutor, disagreeing with the grand jury foreman and the IRS investigator, expected that petitioner's testimony would produce no evidence upon which to indict the alleged bribe takers.

(c) Petitioner also contends (Pet. 29–46) that he did not wilfully commit perjury since, according to his claim, he was illegally coerced and entrapped by the government into testifying falsely before the grand jury. The record belies this claim.

When the district judge granted petitioner immunity, he compelled petitioner to testify under pen-

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tioner, unlike Icardi and Cross, was summoned to testify during an ongoing grand jury investigation of his bribery accusations. And, unlike Cross, he had not in a prior appearance denied or affirmed the bribery transactions; rather, he had evaded giving direct answers and thereby had in effect refused to testify.

alty of contempt. But such "coercion" under a grant of immunity has been specifically authorized by 18 U.S.C. 2514 and 6001 for grand jury investigations of bribery of public officials. Here the grand jury was still investigating petitioner's bribery accusations when he was granted immunity on August 21, 1969. Clearly, petitioner's testimony was "material" to the investigation of charges originally made by him. Moreover, by virtue of 18 U.S.C. 2514, the district court properly adjudged petitioner in contempt when he gave deliberately evasive answers during his secon appearance before the grand jury on August 21.

Petitioner asserts that, in his second appearance before the grand jury, he had answered the questions put to him, but that he was nevertheless held in contempt and compelled to give the perjurious testimony desired by the judge and the prosecutor (Pet. 33–37). The judge in the contempt hearing found as a fact that petitioner had not answered the questions put to him; instead, he gave evasive testimony, which is equivalent to a direct refusal to testify (A. 97–98; see *Richardson* v. *United States,* 273 F. 2d 144, 147–148 (C.A. 8), and cases there cited). Indeed, petitioner testified at trial that he had deliberately given evasive answers, because "I didn't want to lie" (A. 241). The other possibility, of course, was to give direct truthful answers. Petitioner's current assertion that he had in fact truthfully testified in his second grand jury appearance that he did not know whether the bribes had been given is also belied by his public statement between his second and third appearance before the

grand jury that "I do know exactly what happened" (A. 273).

Petitioner errs in contending that the prosecutor and the judge compelled petitioner to repeat under oath his prior statements to IRS officials. Neither in granting immunity nor in ordering petitioner held in contempt did the judge intimate in any way what the content of petitioner's testimony should be.

Rather, in granting immunity, the district judge directed petitioner "to answer the questions which you have heretofore refused to answer, on the grounds of possible self-incrimination" (A. 88); and, in adjudging petitioner in civil contempt, the judge committed petitioner to the United States Marshal "for such time as you * * * refuse to answer the questions put to you by the Government, before the Grand Jury, under the protection of the immunity previously granted to you by this Court" (A. 98). Once petitioner gave direct truthful answers he would have purged himself of contempt and would no longer have been subject to imprisonment for civil contempt or prosecution for perjury.

Neither the prosecution nor the IRS investigators ever importuned petitioner to testify falsely. They, like the Michigan State Police and petitioner's attorneys, simply advised him to testify truthfully (A. 144, 166, 203). Contrary to petitioner's contention (Pet. 32), they never advised him that he should repeat his accusations under oath. There was no entrapment.

As noted by petitioner (Pet. 45), entrapment occurs when law enforcement authorities cause to be committed a crime which would not have occurred but for their machinations. *Sherman* v. *United States*, 356 U.S. 369, 372. Here, DeBoer's only "machination" was investigation of petitioner's accusations, and O'Leary's only "machination" was calling petitioner to testify before a grand jury which was considering the truth or falsity of his accusations.[10]

2. Petitioner argues, but does not present as a question for review, that the district court improperly imposed a separate and cumulative sentence on each count of the indictment. This contention is likewise without merit.

The indictment charged that petitioner falsely testified that six officials (four IRS agents and two Detroit officials) separately received bribes from petitioner at a Christmas party in 1967. The indictment also charged that petitioner falsely testified that one of these IRS agents, another IRS agent and another

[10] Nor, contrary to petitioner's contention (Br. 42), did prosecutor O'Leary "literally bludgeon" him into committing perjury. Rather, he arranged to give immunity to petitioner, thus preventing any federal prosecution of petitioner for making false statements to the Internal Revenue agents in violation of 18 U.S.C. 1001. After petitioner's deliberately evasive testimony during his second appearance, O'Leary did attempt to elicit direct answers from petitioner. But eliciting direct answers from a recalcitrant witness, who over a period of five months had clearly described the details of his alleged bribery transactions and who three weeks previously had testified at a state trial that Joseph Barbara had bribed IRS agents and Mayor Cavanaugh at his 1967 Christmas party (A. 90–91), is not in any sense "bludgeoning" a witness.

Detroit official had received bribes in petitioner's presence following their attendance at a boxing match in 1964. Petitioner's claim that this is a single lie broken down into twelve counts is inaccurate. Rather, the testimony concerning each separate payment, six bribes at the Christmas party and three following the fight, constituted nine lies, each wholly distinct from the others, which properly may be subject to separate punishment. See *Gebhard* v. *United States*, 422 F. 2d 281, 289 (C.A. 9). See, also, *United States* v. *Tyrone*, 451 F. 2d 16, 18 (C.A. 9); *Richards* v. *United States*, 408 F. 2d 884 (C.A. 5), certiorari denied, 395 U.S. 986.

When petitioner in his testimony separately accused seven officials of receiving bribes on one of two occasions, and accused an eighth official of receiving bribes on both occasions, his false testimony constituted multiple crimes—wrongs against each of these officials and wrongs against the grand jury. If the grand jury had believed petitioner's testimony, each of these officials might have faced a bribery indictment. In these circumstances, under a reasonable construction of the perjury statute and with due regard to the evils it is directed to prevent, this testimony constituted, as in *Gebhard*, separate lies—nine in number—which were properly prosecuted and punished under separate counts.[11]

[11] The government conceded that three of the counts were repetitive; the court below vacated the sentences on those counts (Pet. App. 10a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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January 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974